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OVERSIGHT ON CIVIL RICO SUITS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

OVERSIGHT ON CIVIL RICO SUITS BROUGHT UNDER 18 U.S.C. 1964(c)

MAY 20, JULY 31, AND SEPTEMBER 24, 1985

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OVERSIGHT ON CIVIL RICO SUITS

MONDAY, MAY 20, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met at 8:30 a.m. in room 226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

This morning the committee will begin receiving testimony on private civil suits which have been filed under the Racketeer Influenced and Corrupt Organizations Act, more commonly called RICO.

Last fall, numerous expressions of concern were voiced to me relating to the proliferation of civil suits being brought under RICO, and whether those suits comport with congressional intent in passing the act.

When RICO became law as title IX of the Organized Crime Control Act of 1970, it was designed to be one of several weapons for Federal prosecutors to use: First, to eliminate the economic foundations of organized crime, and second, to prevent organized crime from investing in—and thereby corrupting—legitimate businesses.

Regrettably, the improvements contained in the 1970 Organized Crime Control Act have seemingly proven insufficient to stem the rising tide of organized crime activities. During the 98th Congress, I chaired a series of Judiciary Committee hearings on the subject. It was patently clear that organized crime is increasingly determined to continue its illegal activities. That resolve has been manifested in imaginative efforts to subvert the law in "new and improved" ways. Organized crime has taken new forms beyond the traditional Mafia or Cosa Nostra families. Oriental crime groups and motorcycle gangs have emerged as new threats to American enterprise and the safety of our citizenry.

From time to time, the need arises for Congress to reexamine an act, to ensure that it is being implemented according to congressional intent. That intent may take one of two forms—the intent of the Congress responsible for its enactment, or the intent of the current Congress in light of changing circumstances and needs. Certainly, the private civil RICO provisions have been interpreted and applied in ways which necessitate further congressional scrutiny.

Under RICO, the prosecution must show that the defendant, directly or indirectly, and through a "pattern of racketeering activity" or collection of an unlawful debt, invested in, maintained an interest in, or participated in the conduct of an enterprise which affects interstate or foreign commerce. The defendant's conduct must have caused injury to the victim's business or property by reason of the RICO violation. Conspiracies are also punishable.

In addition to the severe criminal and civil remedies which would be available to the Government, Congress included provisions in section 1964(c) of title 18 of the U.S. Code to permit victims of racketeering to sue in Federal court and recover treble damages and attorney's fees. According to some accounts of the legislative history, this private cause of action was included as an incentive for victims of organized crime activity to redress wrongful actions against their legitimate businesses. Because of the limited resources available to assist the Government in its fight against organized crime, it was believed that "private attorneys general" could supplement Government efforts.

While the goal was laudable, the applicability of RICO private civil remedies is complicated by the types of offenses which give rise to RICO violations. These so-called predicate offenses are not confined to those which we traditionally associate with organized criminals—murder, arson, bribery, and narcotics offenses. They also include mail fraud, wire fraud, bankruptcy fraud, and fraud in the sale of securities. These extremely broad offenses, coupled with the fact that the interstate commerce requirement is minimal, have given rise to civil RICO suits relating to securities fraud, commercial fraud and tender offers. Since many courts have held that no connections to traditional organized criminal activities need be alleged, these cases can involve what heretofore have been strictly business disputes. As a former U.S. attorney from Texas has observed: "Your last name does not have to end in a vowel for RICO to apply to you."

In addition to the possibility that RICO private civil remedies are being applied in cases which may not present an organized crime problem, there is another disturbing aspect in the current situation. One of the apparent incentives for practitioners to use RICO is the ability to sue in Federal court in areas which have traditionally been left to the States. I do not believe that RICO should be used to federalize causes of action in those areas, absent a clear and specific congressional determination that this would comport with our system of federalism.

Let me emphasize one point: We cannot, and we will not, weaken Federal criminal and civil penalties as they apply to organized crime figures. Nor can we permit laws directed against organized crime to be so inflexible that they cannot keep pace with its new forms and methods. On the other hand, we cannot allow severe laws like RICO to be perverted by fertile legal minds for purposes beyond the urgent needs which they were intended to address.

For this reason, on October 5, 1984, I announced my firm intention to hold hearings on this important matter. We will be hearing from representatives of the Federal and State Governments, business and legal organizations, and the academic community. The issues presented in this area are difficult ones, and some of these issues are currently before the Supreme Court. I am hopeful that the testimony of our witnesses today, and those at our second hearing, will be helpful in educating the committee about the current legal situation, and proposed solutions.

Before we call our first witness, I wish to place several statements of committee members in the record.

[Statements follow:]

OPENING STATEMENT BY SENATOR JEREMIAH DENTON

Mr. Chairman: The Congress enacted the Racketeer Influenced Corrupt Organizations Act (RICO), as part of the Organized Crime Control Act of 1970, to provide prosecutors with a weapon against crime syndicates. The criminal statute also provides for a civil remedy for victims of organized crime.

RICO makes it unlawful for any person to use a pattern of racketeering activity, or any income derived from it, to conduct or acquire an interest in an "enterprise." "Pattern of racketeering activity" has been defined to require two acts of racketeering activity within ten years.

Since its enactment, the RICO statute has been used successfully countless times to attack the pornography industry. With the addition to the definition of "racketeering activity" of state and Federal offenses involving obscenity, it is anticipated that the RICO statute will allow an even broader attack on the industry.

Mr. Chairman, I am aware of the raging debate about the application of civil RICO against business people in cases of commercial fraud. I commend you for examining that issue here. I hope, however, that any criticism or proposed modification to the RICO statute will not adversely affect the criminal or civil application of RICO to cases involving pornography.

I look forward to following today's debate and working towards the resolution of any possible misapplication of civil RICO.

Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I commend you for holding this hearing to examine the extent to which the civil provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") should be modified. I think it is fair to say that over the past several years few provisions of the civil statutes related to federally created causes of action have engendered as much criticism or generated as much comment.

Some would say that that alone is evidence that drastic reforms in the civil provisions of RICO are necessary. Yet it may be that the original congressional purpose is merely being effectuated.

Much of the commentary, as well as the judicial opinions, has wrestled with the substance of that original congressional intent. Perhaps Congress never intended to extend these provisions to the garden variety franchise case in which the mailing of two or more fraudulently prepared cash register reconciliation sheets apparently satisfies the prima facie RICO case—a "pattern of racketeering activity." On the other hand, the language of the statute is clear, and the results of its application, including greater reluctance to take legitimate business activities to the limits of ethical or honest business practice cannot be said to be uniformly bad.

I come to this hearing with an open mind, and I am eager to consider the testimony of the very distinguished witnesses, including Senator Hruska. I am confident that their testimony will be enlightening.

Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR PAUL SIMON

Mr. Chairman, I welcome today's examination of the civil provisions of RICO.

RICO was enacted as part of the Organized Crime Control Act of 1970, which was designed to halt organized crime's infiltration into the American economy. RICO created new remedies against defendants who used business enterprises for racketeering activity. In addition to fashioning powerful tools for the government to use in its fight against organized crime, RICO granted a private right of action to victim's injured by violations of the Act.

Recently, both bench and bar have hotly debated private civil actions under RICO. RICO claims, with their treble damage provisions, have been used increasingly in litigation against banks over interest rates. In disputes between brokerage firms and their customers and in cases unrelated to organized criminal activities.

Moreover, judicial circuits are split as to the requisites of a RICO claim—what suffices in Chicago may not work in New York.

Indeed, it is not clear whether Congress recognized all the possible applications of RICO when it enacted the provision. However, one thing is clear: Congress intended to use RICO as part of its broad arsenal to combat organized crime. It constructed a private cause of action to buttress this weaponry. If we are to tinker with RICO's strong and effective civil and criminal sanctions, we must do so judiciously. Congress must insure that any limitation of RICO does not enfeeble the fight against organized crime.

The **Chairman**. Now, we have a number of witnesses here today, and we are very fortunate and honored to have a former member of the U.S. Senate and a former ranking member of this committee, who would have been chairman if he had stayed here, to testify here today. We are very proud of him and the great service he has rendered to this country, and we would be pleased to hear from him at this time. Hon. Roman L. Hruska of Omaha, NE. Senator, you may proceed, if you wish.

STATEMENT OF HON. ROMAN L. HRUSKA, COUNSEL, KUTAK, ROCK & CAMPBELL, OMAHA, NE

Mr. **Hruska**. Thank you, Mr. Chairman.

It is certainly a pleasure and a rather unique situation to be giving testimony instead of taking testimony in this room. As the chairman has observed, for some 20 years he and I sat side by side during the conduct of the business of this committee, and it was comforting to have you there, Mr. Chairman, because often you furnished that additional impetus to get things in their proper order.

The Chairman. Thank you very much.

Mr. **Hruska**. An invitation came to me from you, Mr. Chairman, because of your committee's interest in the history and the original intent of Congress in passing the Racketeer Influenced and Corrupt Organizations Title XI in the Organized Crime Control Act of 1970; and because of my participation leading to its passage. I am pleased to have been asked to contribute. I hope I can be of some assistance to you.

When I left the Senate in December 1976, I returned to my home in Omaha, NE, and became associated as counsel to a law firm there, Kutak, Rock and Campbell, which also has offices in Atlanta, Denver, and Washington, DC. It has a national practice which involves representation of banks, securities dealers, insurers, large corporate businesses, and related fields.

Upon receiving the committee's invitation, and after a very preliminary review of my personal files on passage of RICO, I visited with some of my firm's litigation partners as to their activities as defense counsel in RICO lawsuits in recent years. In response, they recited the essence of the questions and issues which have prompted the need for these hearings which commence today.

Mr. Chairman, I am always pleased to see lawyers prosper, particularly those associated with a firm for which I provide counsel. But I do want to say that following those talks and the brief review I mentioned, I was deeply disturbed and distressed, because it is quite apparent that in the past several years we have seen a distortion and an unintended application of RICO provisions in ways that have produced harmful results.

INTERCIRCUIT CONFLICT ON RICO CLAIM

The RICO claim: The committee is undoubtedly familiar with the RICO claim. It would serve no useful purpose to detail all of its elements beyond a brief description which will serve to put following narrative in perspective. Section 1964(c) of title IX reads:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate U.S. district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee.

Section 1962 prohibits persons who receive income "from a pattern of racketeering activity" from engaging in certain acts. The statute defines racketeering first by listing a number of crimes normally associated with organized crime, and then by providing that a "pattern of racketeering" exists upon the violation of any two of those crimes within a given period of time. Upon such violation, subsection (c) is triggered and proper foundation is laid for an action in Federal district court for the treble damages, costs of suit and reasonable attorney's fee.

There is a sharp difference of holdings of courts as to when a person acquires standing to file such a suit in Federal court. This difference is best illustrated by reference to two cases, one from the seventh circuit and the other from the second circuit. The committee is no doubt familiar with these decisions, so only a brief characterization of the holding in each will be set forth here.

Second circuit, *Sedima* Case (741 Federal 2d 482), holds that as a prerequisite to the filing of a RICO case, there must be a prior conviction of the defendant in a criminal prosecution, for the violation of the required predicate acts as set out in section 1962.

Seventh circuit, *Haroco* Case (747 Federal 2d 384). Its holding rejected the view that prior criminal conviction is necessary to acquire standing to sue on a RICO claim. It held that subsection (c) lawsuits can be filed and prosecuted in so-called "white collar" cases simply by alleging that the defendant violated the two required predicate acts within the prescribed time period.

This intercircuit conflict is now in the Supreme Court pending a decision, having been argued there last month. Upon decision being rendered, it will be for Congress to consider whether it is satisfied with the result or whether Congress will seek further legislation.

THE NEED FOR CONGRESSIONAL ACTION

The literature and rhetoric as to congressional intent in enacting present section 1964(c) are extended, and in fact, voluminous.

It is submitted that further exercise in this line are not necessary or pertinent. Regardless of the results of the Supreme Court decision, a reconsideration by Congress on this issue is needed and should be made promptly.

The real question ultimately and logically will be: What does Congress wish to declare and provide as the scope and goal of the remedies in the present section 1964(c), or its successor, or equivalent?

The time and occasion for such reconsideration are highly propitious. The course of litigation on this issue in very recent times has developed a broad history and wide impact. That experience and the results it has produced have been viewed in different ways. In the light of that experience and in the further light of the upcoming Supreme Court action, Congress is in a position to make a well-informed decision as to what it considers proper and most favorable as national policy on this issue.

THE FIGHT AGAINST ORGANIZED CRIME

Before considering section 1964(c) further, it would be well to recall and review the history of the battle of the American public and of the Congress against organized crime. This will serve to place the subject into better and proper perspective.

Enactment by the Congress of the organized crime control bill of 1970 was the culmination of literally decades of study and action on the subject.

The Nation has been combating organized crime for a long time indeed. Properly so, because it is a blight, a hideous monster of huge, pervasive impact and burden upon the daily lives of our citizens everywhere. Its evils and unlawful operations have been disclosed, documented, and dramatized in various ways.

The earliest and very spectacular efforts were the nationwide Senator Estes Kefauver hearings beginning in 1951, more than a third of a century ago. His work was followed by Senator John L. McClellan, as chairman of the Senate Government Operations Committee. His efforts were vigorous and productive. Robert Kennedy, as committee counsel and later as Attorney General, also rendered notable service. There were Presidential messages. President Lyndon Johnson created a National Crime Commission, which made its report in 1967.

In the Senate Judiciary Committee, a Subcommittee on Criminal Laws and Procedures was authorized in 1966 at the insistence of Senator McClellan, who became its first chairman. This Senator served as ranking minority member. What a privilege it was to work and associate with that stalwart patriot, and competent prosecutor and legislator.

The long process then came to the enactment of the Organized Crime Control Act of 1970. Its provisions were directed against organized crime, to check it, to work against its spread, to provide new tools for the task and to prosecute and punish its violators.

Its basic, primary mission was to marshal our nation's enforcement resources, dollars, and manpower to eliminate the scourge of organized crime.

NATURE AND ESSENCE OF ORGANIZED CRIME, A REVIEW AND A REMINDER

Mr. Chairman, it is fully 15 years since the act of 1970 became law. For useful, current orientation, let us recall the atmosphere and environment of that period; as well as congressional and public consciousness of the nature and ravages of that phenomenon known as "organized crime."

It is an elaborate hierarchy—a body of persons organized and classified according to rank, capacity, and authority. It operates as an invisible form of government; dictatorial, tyrannical, oppressive. Edicts of the rulers, even the slightest order, are carried out dutifully, scrupulously, and mercilessly by the lesser members. Disloyalty, disobedience, and even inefficiency in performance mean summary imposition of sanctions without benefit of hearing or trial. Punishment runs the gamut of beatings, torture, deprivation of property, and often capital punishment in gangland style.

Department from my statement, Mr. Chairman, it was in the years of Al Capone that this Senator attended the Chicago Law School. I still recall on the morning of February 15 when we picked up the daily newspaper to find the story of St. Valentine's Day Massacre, where some 15 or 16 members of one of these organized crime bodies were marched up against the doors of a double garage, and on the opposite side of the alley the fellow mobsters, other gangsters, opened fire with their machine guns and mowed them down mercilessly. Those were the days when it was not uncommon to fish off of the dock on the lake there to recover the bodies of people who had fallen in disfavor with the leaders, and on each foot was a bucket of concrete in which they were invited to stand until they were hardened, and then they were dropped into the water. Many other atrocities, many other acts of those kinds are detailed in the hearings, and with the passing of time we sometimes lose sight of those horrible things which are still going on.

This government of families and their many members make it a full-time, professional, and exclusive occupation to disregard the laws of the land, and to prey upon all levels of the populace, as well as upon businesses and enterprises of all kinds—from within and from the outside.

It is contemptuous of the rules of conduct and even of standards of human decency which our Nation has evolved through the ages through our democratic, constitutional structure. It exploits and despoils our institutions wantonly—institutions which have been developed through the generations of our Nation to form a civilization worthy of human aspiration.

The depredations of organized crime still exist. They continue to flourish in many parts of the country. Mind you, Mr. Chairman, they still are hard at it a third of a century after their true colors and patterns were recorded in congressional hearings, in the Nation's press, and otherwise. And 15 years after the act of 1970 was signed into law.

THRUST AND PRINCIPAL MISSION OF ACT OF 1970

Mr. Chairman and members of the committee, the Organized Crime Control Act of 1970 has as its aim and thrust the creation and furnishing of tools and procedures to combat the menace of the professional, full-time gangsters, hoodlums, mobsters and racketeers and the organizations they formed to carry on their programs of victimization and pillage of our citizens.

That enactment showed emphatically the recognition of the existence of a special kind of crime and criminal; and further showed the determination of Congress to formulate a special kind of treatment and enforcement to combat that specialty.

The objective of creating a special kind of treatment to contend with a special category of crime and criminal is clearly demonstrated in the record of hearings, by the committee reports, and in the debate and floor discussion in both bodies of Congress.

This is also demonstrated in the type and nature of the law's diverse and far-reaching provisions. They are specially designed to deal with and fight organized crime. Turn them over in your minds; here they are: enlargement of grand jury powers; revision of criminal procedures; extended sentencing of habitual criminals; procedures for Government forfeitures of properties acquired by these felons with the proceeds of the ill-gotten, tax-free revenues. These are but a few; there are more.

All of these factors, history, and surrounding circumstances point to creation and approval of special methods and means for successfully challenging and overcoming special crimes and criminals. The crimes? Those engineered and perpetrated by the organizational "families." The criminals? The full-time, professional gangster, mobster, and racketeer, none of whom either know or pursue any other occupation than a systematic, relentless criminal career.

CONSIDER NOW SECTION 1964(C), TITLE IX

At issue here is the scope of this section in determining the persons who can be made defendants in RICO claim lawsuits in which treble damages are sought.

It is well accepted that "racketeers" of the traditional, conventional reference (like "full-time, professional, habitual criminal") readily qualifies as a defendant in treble damage suits.

Difference of opinion exists as to whether the scope of that section 1964(c) should be sufficiently broad to include "white collar" and also "garden variety" crimes. It is difficult to define those terms as to who such defendants are. It is easier to understand what they are not.

Taking that easier path, white collar and garden variety offenders are not within that category of offenders from the world of organized crime which historically led to the development and enactment of the act of 1970, as has been explained earlier in this statement.

The origin and motivation for devising and enacting that act of 1970 lie in search for special methods and means for successfully challenging and overcoming the evils of special crimes and special offenders. There is scant and isolated reference to other crimes or criminals; there is no discussion or indication that there should be application to the general or to a wider field of criminal behavior.

Mr. Chairman, with your indulgence and that of the committee, and with such sense of modesty as may be due in the premises, permit me to express a thought or two on my own views on this subject.

My association and participation in the formation of title IX of the Organized Crime Control Act of 1979 dates from its very inception, in fact, it might be said from its very conception. This was when I introduced an organized crime control package on June 29, 1967. Included in the package were two bills, S. 2048 and S. 2049. By way of information on that subject, I set forth the language appearing on page 83 of the Senate Judiciary Committee report on S.

30, comments on the provisions that eventually became title IX or the Civil RICO. The report is dated December 18, 1969:

> Title IX of S. 30, as amended, is derived from originally introduced by Senator McClellan for himself, and Senators Ervin and Hruska, on April 18, 1969. In turn, S. 186 was the product of the Subcommittee's hearings on S. 1623, which was introduced by Senator Hruska on March 20, 1969 . . . S. 1623, in turn was based on S. 2048 and S. 2049, 90th Congress, 1st session (1967), sponsored at that time by Senator Hruska . . ."

Any semantic exercises to the contrary notwithstanding, and speaking for myself, it was not my intention that the civil sanctions contained in title IX serve as a vehicle to engage in the type and extent of use to which many efforts are directed. My bills, and their successors, were directed at organized crime. They were not intended to be a vehicle to charge legitimate businessmen with organized crime activities. It is conceivable that the provisions could be modified and restrained somewhat if necessary. But certainly a wide open indiscriminate use such as that which we have witnessed for the past few years is not in order or desirable.

In developing the original proposal in 1967, my staff and I worked closely with Washington attorney Fred Rowe, who was at the time the chairman of the Antitrust Section of the American Bar Association. Of course, I also had close contact with Congressman Dick Poff, who introduced companion legislation in the House and provided strong leadership during House consideration of S. 30.

So we get back to square one. What does Congress wish to declare and prescribe as the scope and goal of the remedies presently expressed in section 1964(c)?

It is to this topic that this committee should direct its attention, study and action. As promptly as is feasible.

Mr. Chairman, without intent to be presumptuous, may I suggest some topics for inclusion in the schedule or agenda for such consideration as you and your committee will accord this very important subject:

A study, review and revision of the predicate acts list.

To make more definite and certain as to how a violation must be established.

Should required proof of violation of a predicate act be equivalent to proof required for criminal conviction?

Should violation of a predicate act be relevant to the cause of action?

Should the United States be included as a qualified plaintiff?

Should a judicial impact statement be prepared?

On this last suggestion, I would prefer to be somewhat more positive, namely: a judicial impact statement should be prepared.

Any potential increase in the workload of the Federal court system should receive close scrutiny and earnest consideration. For obvious reasons, Chief Justice Warren Burger suggested the preparation of a judicial impact statement. [The state of the Federal Judiciary, 1972. 58 A.B.A.J. 1049-50.] And in the Pound Conference held in St. Paul, MI, April 1976, a noted former Federal Judge and eminent student and authority on the law, Simon H. Rifkin, stated in his paper:

> Impact statements are indeed necessary—both so that legislatures can think twice about enacting laws which will have an impact on the courts disproportionate to

> their social utility, and so that judges can be appointed in anticipation of the increased caseload—not years after the burden has become backbreaking. . . .

Mr. Chairman, attached hereto is an appendix containing reprints of relevant legislative history of title IX. It may not be all inclusive, but it covers the substance of the evolution of civil RICO.

Now, that issue of the impact statement that I made will involve a federalization of large segments of litigations and prosecutions and trials that should be taken care of by the State courts. But I am confident that the testimony you will shortly receive can treat that subject much more thoroughly than I.

Now, Mr. Chairman, with these concluding remarks, first of all, I have furnished and attached to my statement an appendix in which I have outlined legislative——

The **Chairman**. I want to thank you very much. It is a very splendid piece of work, it appears, and we appreciate it.

Mr. **Hruska**. The list is not complete, but copies have been furnished for your files or for the record, as you wish.

[Information furnished:]

Appendix 1

Extracts of Legislative History of Title IX of the Organized Crime Control Act of 1970. (Racketeer Influenced Corrupt Organizations)

1. Remarks of Senator Roman L. Hruska upon introduction of S.2048 and S.2049, June 29, 1967. 113 Cong.Rec. 17997-803.

2. Remarks of Senators John L. McClellan and Roman L. Hruska on the introduction of S.30, March 11, 1969. 115 Cong.Rec. 5872-86.

3. Remarks of Senator Roman L. Hruska upon introduction of S.1623 and S.1624, March 20, 1969. 115 Cong.Rec. 6992-98.

4. Remarks of Senator John L. McClellan on the introduction of S.1861, April 18, 1969. 115 Cong.Rec. 9566-71.

5. Extracts of the Senate Committee Report on S.30, S. Rep., no. 617, 91st Cong., 1st Sess. 75-83.

6. Senate floor debate on S.30, January 20-23, 1970:
   Remarks of Senator John L. McClellan, 116 Cong.Rec. 591-92;
   Remarks of Senator Roman L. Hruska, 116 Cong.Rec. 600-02;
   Remarks of Senator Strom Thurmond, 116 Cong.Rec. 952-53.

7. Remarks of Congressman Richard Poff on Title IX of S.30, March 10, 1970. 116 Cong.Rec. 6707-10.

8. Extracts of the House Committee Report of S.30. H. Rep. no. 1549, 91st Cong., 2d Sess.(1970). pp. 35, 57-58.

9. House floor debate on S.30, October 6-7, 1970.
   Remarks of Congressman Emanuel Celler, 116 Cong.Rec. 35196;
   Remarks of Congressman Richard Poff, 116 Cong.Rec.35200-01; 35290-96;
   Remarks of Congressman Abner Mikva, 116 Cong.Rec. 35204-05.

10. Senate floor debate on S.30, October 12, 1970.
    Remarks of Senator John L. McClellan, 116 Cong.Rec. 36292-96;
    Remarks of Senator Robert J. Dole, 116 Cong.Rec.36296.

No. 1

June 29, 1967 CONGRESSIONAL RECORD — SENATE 17997

NEW WEAPONS NEEDED IN WAR AGAINST ORGANIZED CRIME

Mr. HRUSKA. Mr. President, the vitals of American society are threatened with the cancerous growth of organised crime in this country. J. Edgar Hoover has described it as "filth with a vile stench," and "the personification of every lawless evil."

He and other responsible law enforcement officials throughout the country have pleaded for public support for their attempts to deal effectively with this scourge. Too often the response has been indifference and apathy.

For those who care to learn the facts, the nature of this threat is easily ascertainable. The public record contains many efforts to study and do something about this menace. In 1950, Attorney General McGrath called a conference on organized crime. In the same year the American Bar Association established a special study commission.

Congress has devoted painstaking study to the subject dating from the early fifties when a Special Committee to Investigate Organized Crime in Interstate Commerce was created in the Senate. Several years later, the Senate Select Committee on Improper Activities in the

Labor or Management Field conducted an exhaustive study.

The Senate Permanent Subcommittee on Investigations continued this work under the leadership of the distinguished senior Senator from Arkansas [Mr. McClellan].

The McClellan subcommittee held hearings concerning gambling and organized crime in 1961. Eighty-nine witnesses were heard. Thirty-three of these invoked the privilege of the fifth amendment. In 1963 and 1964, hearings were held concerning organized crime and illicit traffic in narcotics. These consisted of 15 days of hearings with 54 witnesses. Extensive material concerning La Cosa Nostra was placed in the hearing record based on the testimony of Joe Valachi.

Annually the Director of the Federal Bureau of Investigation has reported to Congress in testimony before the respective Appropriations Subcommittees of the House and Senate.

Most recently, the President's Commission on Law Enforcement and the Administration of Justice devoted an entire chapter in its report to this subject. In addition, numerous studies have been made at the State and local level.

So the record is detailed and documented, but congressional and public response has been spotty at best. While efforts to control it continue unabated, organized crime extends into so many areas of endeavor that, on balance, it appears that we are barely holding our own.

NATURE OF ORGANIZED CRIME

Organized crime in the United States is a tightly knit and strictly disciplined criminal cartel. The largest organization is, of course, La Cosa Nostra.

This criminal tyranny has been found according to Director Hoover, to control the major racket activities in many of our major metropolitan areas. It operates on a nationwide basis and even across international borders. Until the spotlight of national attention was focused upon this group by Senate investigating committees and others, it carried on its nefarious activities with almost complete secrecy. It is bound by its own body of "law" and "justice," which is not responsive to the control or authority of established legal institutions.

La Cosa Nostra has a well-defined organizational structure. It is broken down into geographic or population groups, each group referred to as a "family." Often there is a well-defined chain of command similar to the military. Top leaders in each "family" consist of bosses, underbosses, counselors—"consiglieri"—varying numbers of "caporegime" or captains. The general cadre are often referred to as "soldiers," amico nostro—friend of ours—or, in some cases, "button men." The soldiers carry out missions or assignments from superiors ranging from running errands to contract murders. They are the organization's enforcement arm.

Nationally the most powerful and feared bosses make up the ruling body of La Cosa Nostra. This group is known as "the commission." The commission presides over about two dozen "families" operating throughout the country. In all, the total membership in these "families" exceeds 5,000 with more than 2,000 in the New York area alone.

This group has been found to be the dominant criminal group in this country. It works closely with leading racket figures from a variety of other groups. Mr. Hoover contends that—

> Taken as a whole, La Cosa Nostra, operating in concert with other less important racket groups, presents a serious threat to the well being of our society.

Mr. President, the President's Crime Commission Report contains an organizational chart of an organized crime family that is most appropriate. I ask unanimous consent that it be inserted in the Record at this point.

The PRESIDING OFFICER (Mr. Mansfield in the chair). Is there objection? The Chair hears none.

There being no objection, the chart was ordered to be printed in the Record, as follows:

An organized crime family

Boss:
    Consigliere (counselor).
    Underboss:
        Caporegima (lieutenant) (3):
            Soldiers (members grouped under lieutenants):
                Through threats, assault, and murder enforce discipline over members, nonmembers, and fronts on order from leader. Corrupt police and public officials. [illegible] control in multi-State area
                With and through nonmember associates and fronts participate in, control, or influence:
                    Legitimate industry: Food products, realty, restaurants, garbage disposal, produce, garment manufacturing, bars and taverns, waterfront, securities, labor unions, vending machines, and others.
                    Illegal activities: Gambling (numbers, policy, dice, bookmaking), narcotics, loansharking, labor racketeering, extortion, alcohol, and others.

ORGANIZED CRIME'S PENETRATION INTO LEGITIMATE BUSINESS

Mr. HRUSKA. The illegal activities of organized crime—gambling, narcotics, loan sharking, prostitution, extortion, and the rest—generate tremendous amounts of gross revenue, mostly in cash. Estimates of this take run into the many billions of dollars annually. Substantial, though unknown, amounts of this money are then funneled into legitimate business.

Virtually no area of the economy is free of organized crime activity. Barbershops and brokerage houses, real estate and restaurants, construction and housewrecking, garbage removal and garment manufacturing, vending and coin machine operations—especially cigarettes and jukeboxes—entertainment and sports, have been infected by the hoodlum influences.

Recent testimony before the Criminal Laws Subcommittee by the district attorney of a major metropolitan jurisdiction reveals that organized crime in this one area alone had attempted to infiltrate and take over the area's barber shops, garbage collection, jukeboxes, and even retail milk distribution. In each of these instances, large amounts of cash coupled with threats of violence, extortion, and similar techniques were utilized by mobsters to achieve their desired objectives: monopoly control of these enterprises.

Oftentimes loan sharking activities are the entering wedge. Sometimes called "shylocking," loan sharking not only produces great amounts of cash for the hoodlums, but is often a vehicle by which they obtain control of business enterprises. In some cases, public records show, loan sharks have forced businessmen who have borrowed from them to place one or more of the henchmen on the company payrolls. This is often the first step toward the eventual takeover of a company. In one operation in the midwest, a hoodlum forced a small businessman who had accepted a loan to place him on the company payroll at a "salary" of $1,000 per month. This "salary" covered only the interest on the loan and did not apply to principal.

No holds are barred when it comes to collection methods. Debtors have been subjected to severe physical beatings and maimings or have even been put to death. Others have been coerced through threats against their families or friends.

In recent weeks the financial journals have carried stories of current investigations involving manipulation of listed stocks on a major exchange by persons with known underworld ties. A simple but effective procedure was followed. First, an established brokerage house would be penetrated by the placing of a customer's man with a criminal background. Then, miraculously, almost overnight, the new man would become a top producer and attract "customers" with substantial funds available for investment. From there, target companies would be selected, then substantial and carefully controlled purchases of stockholdings negotiated. Then proven techniques would be utilized to run up the selling price of the affected stock. False rumors would be circulated as to potential earnings or new product developments. Mergers and acquisitions, real or imagined, were promoted. When stock values soared to desired levels, profit-taking would occur. Then the helpless management, stockholders, and creditors were left holding the bag.

Numerous other examples could be cited, but the following extract from the President's Crime Commission is pertinent:

> Today, the kinds of production and service industries and businesses that organized crime controls or has invested in range from accounting firms to yeast manufacturing. One criminal syndicate alone has real estate interests with an estimated value of $300 million. In a few instances, racketeers control nationwide manufacturing and service industries with known and respected brand names.

The Commission also identified at least four methods by which control of legitimate business has been acquired. These are:

First. Investing concealed profits acquired from gambling and other illegal enterprises.

Second. Accepting business interests in payment of the owner's gambling debts.

Third. Foreclosing on usurious loans.

Fourth. Using various forms of extortion.

Also, more sophisticated techniques are known. One organized crime group offered to lend money to a business on condition that a racketeer be appointed to the company's board of directors and that a nominee for the lenders be given first option to purchase the company's stock if a public sale were made. The criminal groups also collect on defaulted loans by acquiring control over businesses and then devise a bankruptcy fraud or collect on fire insurance after the tangible assets of the business have been deliberately destroyed by arson.

The President's Crime Commission has concluded that "too little is known about the effects on the economy of organized crime's entry into the business world," but suggested that the harm done to the public at least suggests how criminal cartels can undermine free competition. The ordinary businessman is hard pressed to compete with a syndicate enterprise.

Mr. President, an excellent article appeared in the U.S. News & World Report some time ago which documents the ways in which organized crime infiltrates legitimate business. I ask unanimous consent that this article be inserted in the Record at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

THE USE OF THE ANTITRUST LAWS TO FIGHT ORGANIZED CRIME

Mr. HRUSKA. The recent report of the President's Crime Commission contained this comment:

> Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's.

Organized crime, which takes billions of dollars—mostly in cash and mostly untaxed—annually from the American public, has broadened its operations by infiltrating and taking over legitimate businesses. Once organized crime has entered a legitimate business, it oftentimes uses its great power and resources to secure a monopoly in the field.

With its extensive infiltration of legitimate business, organized crime thus poses a major threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are eliminated and customers confined to sponsored suppliers. Its effect is even more unwholesome than other monopolies because its position does not rest on economic superiority. Law enforcement here is complicated in most of the ways noted above in the areas of illegal businesses.

The threat of organized crime to our business community as well as to our entire fabric of life is so great that we must make effective use of all available resources in the task of combating organized crime. It must not be said that we had the tools and failed to use them.

PROVISIONS OF EXISTING ANTITRUST LAWS

The existing antitrust laws appear to possess certain features which render them appropriate for use against organized crime.

Section 1 of the Sherman Act makes illegal "every combination, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations"—15 USC 1.

Section 2 of the Sherman Act provides that "every person who shall monopolize or attempt to monopolize or combine or conspire, to monopolize any part of the trade or commerce among the several States" is engaging in an illegal enterprise—15 USC 2.

Violation of either of these sections is punishable by imprisonment of up to 1 year or a fine of up to $50,000 or both.

In addition to criminal penalties, the antitrust laws provide for civil enforcement. Private parties who are injured by conduct violation of the antitrust laws may bring actions to recover three times their losses, plus their attorney's fees—15 USC 15.

In a private damage suit, the fact of a prior Government antitrust judgment involving the same conduct may be used as prima facie evidence that the antitrust laws have been violated—15 USC 16.

Witnesses testifying before a grand jury about antitrust violations are given immunity from prosecution—15 USC 32.

The antitrust laws provide for discovery of facts by means of the grand jury process in criminal investigations, and by means of a civil investigative demand by the Justice Department in civil actions—15 USC 1312.

The above cited provisions appear to be applicable to many organized crime activities.

APPLICATIONS OF ANTITRUST LAWS

In *United States* v. *Bitz*, 282 F. 2d 465 (2d Cir. 1960), the court of appeals sustained an indictment under section 1 of the Sherman Act. In this case, the antitrust laws were used to combat activities of racketeers who were engaged in an unlawful combination and conspiracy in restraint of trade in the wholesale distribution and sale of newspapers and magazines in the New York City area. The conspiracy operated by means of strikes and strike threats to coerce distributors to pay the conspirators sums of money. Those who refused had their shipments of newspapers and magazines interfered with. Convictions were subsequently obtained as a result of the indictment.

In *United States* v. *Pennsylvania Refuse Removal Ass'n*, 357 F. 2d 806 (3d Cir. 1966), cert. denied, 384 U.S. 961 (1966), defendants were engaged in a conspiracy to restrain trade in refuse removal, which operated in part by means of the coercion of nonmembers of the conspiracy. Criminal convictions were upheld on appeal in this case.

And, in *Los Angeles Meat & Provision Driver's Union* v. *United States*, 371 U.S. 94 (1962), the antitrust laws were used in a civil case to attack and enjoin a conspiracy in the sale of yellow grease which was enforced in a coercive manner.

In light of the increasing magnitude of organized crime's interference with legitimate business, it seems appropriate that the Senate Subcommittee on Antitrust and Monopoly conduct an investigation to determine the best means whereby the antitrust laws could be used more actively and more effectively in the fight against organized crime. Such an investigation could also be used to discover what, if any, additional legislation is needed to make the antitrust laws effective against organized crime.

As a vehicle for seeking ways to apply this field of statutory law to organized crime, I introduce today two bills on behalf of myself and several other Senators. Also, companion bills are being introduced in the other body by the gentleman from Virginia, Mr. Poff, and several of his colleagues on the House Republican task force on crime.

The first bill, S. 2048, would make the use of intentionally and deliberately unreported income derived from one line of business in another line of business a violation of the antitrust laws. This would enable the antitrust law enforcement agencies to act promptly to discover the source of funds by means of discovery techniques, and add the sanction of private treble damage suits. Thus, organized criminal activity in legitimate businesses could be attacked before its anticompetitive effect had an opportunity to destroy the business.

By limiting its application to intentionally unreported income, this proposal highlights the fact that the evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime.

Such a provision would be analogous to the doctrine that if a patent is misused beyond the scope of the patent grant or is employed to coerce competitors, the patent becomes unenforceable against infringers and constitutes illegal monopolization under the antitrust laws. For example *Switzer Brothers, Inc.* v. *Locklin*, 297 F. 2d 39 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962).

The second bill, S. 2049, would prohibit the investment in legitimate business enterprises of income derived from specified criminal activities—especially those criminal activities engaged in by members of organized crime families such as gambling, bribery, narcotics, extortion and the like. A full range of criminal and civil sanctions which now exist in our antitrust laws would be made available to enforcement officials and to persons adversely affected by such investments.

The antitrust laws now provide a well established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the "legitimate" business activities of organized crime.

It may well be that these bills I introduce will not be necessary. It may develop during hearings that adequate machinery exists at the present time it existing law to protect legitimate business against the ravages of organized crime. However, if this is not the case, Congress should be advised promptly so that early consideration can be given to these or other measures which may appropriately deal with this vital field of such unfair and predatory competition.

SPECIAL ASSISTANCE TO STATE AND LOCAL JURISDICTIONS TO COMBAT ORGANIZED CRIME

The President's Commission on Law Enforcement and the Administration of Justice made several significant observations concerning the efforts of State and local jurisdictions to combat organized crime. It found that—

> No State or local law enforcement agency is adequately staffed to deal successfully with the problems of breaking down criminal organizations. . . . Local police are hampered by their limited jurisdiction, and law enforcement has not responded by developing sufficient coordination among the agencies.

The Commission found that tactical rather than strategic intelligence gathering was most often engaged in by local enforcement agencies for the immediate objective of prosecution. Thus, significant gaps in knowledge occurred in the ways in which criminal cartels organize and operate as a business. If a body of strategic intelligence information were developed in the various affected jurisdictions, agencies would be better able to predict what directions organized crime might take and how to cope more effectively with them.

The Commission observed that when information is obtained very often there is little or no cooperation with other jurisdictions exchanging information with each other.

The Commission recommended that the attorney general of every State where organized crime exists should form a special unit of attorneys and investigators to gather information and assist in prosecution relative to organized crime. The Commission found that the police departments of every major city should have special intelligence units concentrating on organized criminal activity and prosecutors should be equipped with sufficient manpower assigned full time to organized crime cases.

The Commission also recommended that the Federal Government should create a central intelligence office utilizing computers and other sophisticated data-gathering and related techniques. Also, special Federal financial assistance should be available to encourage development of the above-recommended activities at the regional, State and local levels.

In order to carry forward these recommendations, I am introducing amendment—No. 223—to the administration's crime control bill—S. 917—to provide such assistance.

In those States and political subdivisions thereof which have significant organized crime activity, there would be authorized Federal financial assistance for the purposes of: First, developing State plans to combat organized crime; second, establishing or supporting State and local organized crime enforcement agencies; and, third, establishing systems for organized crime intelligence centers.

These functions would be carried out under the supervision and control of State organized crime prevention councils.

ELECTRONIC SURVEILLANCE

Testimony of respected law enforcement officials before the Senate Criminal Laws Subcommittee indicated that the use of electronic surveillance was an essential tool in efforts to combat organized crime. District Attorney Frank S. Hogan of New York has described the techniques as "the single most valuable weapon in law enforcement's fight against organized crime." Unfortunately, this valuable and proven technique has been the subject of much controversy and confusion. Last year in testimony before the subcommittee, former Attorney General Katzenbach stated:

> Since 1940, every Attorney General has construed the act as not prohibiting wiretapping as such, but as prohibiting the interception and disclosure or use for personal benefit of the information so obtained. Because of the prohibition on disclosure, information obtained as a result of a wiretap cannot be used by State or Federal authorities for the purpose of prosecution.
>
> I agree with my predecessor that the present law regarding wiretapping is intolerable. In fact, I would go so far as to state that it would be difficult to devise a law more totally unsatisfactory in its consequences than that which has evolved from section 605.

Certainly, nothing has occurred in the interim to change this intolerable situation.

While there is legitimate and real concern over the threat to the right of privacy which can be posed by indiscriminate and uncontrolled use of wiretapping and/or bugging, it is imperative that some action be taken. A majority of the President's Crime Commission recommended that Congress should enact legislation dealing specifically with wiretapping and bugging. In its task force report on organized crime the Commission offered specific recommendations in this regard.

It is my conviction that with proper safeguards and controls prepared by Federal and State statutes, electronic surveillance can be a most useful and effective tool. Accordingly, I am introducing a comprehensive bill to achieve that objective.

The bill has the following major features:

Private utilization of wiretapping and bugging would be flatly prohibited.

Federal authorities would be authorized upon the obtaining of Federal court orders pursuant to application of the appropriate U.S. attorney, to conduct electronic surveillance in investigation of specified crimes involving national security and serious criminal offenses.

At the State level, electronic surveillance would be authorized pursuant to State statute and upon order of a court of general jurisdiction.

An elaborate system of checks and safeguards would be established whereby criminal and civil remedies would be available to prevent abuse and unauthorized surveillance by public officials and private persons.

BERGER VERSUS NEW YORK

On June 12, Mr. Justice Clark delivered an opinion of the Supreme Court in the case of *Berger* v. *New York*—No. 615—October term 1966. This opinion struck down the New York State permissive wiretapping law and set forth judicial standards to be applied in the formulation of any new statute dealing with the subject of wiretapping or eavesdropping.

This decision has been carefully reviewed and has been taken into full consideration in the drafting of the bill which I now introduce. As I understand, Mr. Clark's opinion sets forth the following standards:

First. There must be a neutral and detached authority interposed between the police and the public; that is, orders for interception of the communications falling within the privilege of the fourth amendment must be issued upon the order of an impartial judge of competent jurisdiction.

Second. Probable cause must exist where the facts and circumstances within the knowledge of the official requesting the order and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

Third. The warrant must particularly describe the place to be searched and the persons or things to be seized.

Fourth. The specific crime which has been or is being committed must be identified.

Fifth. Precise and discriminate procedures must be spelled out for issuance of the order.

Sixth. The order must relate to specific conversations sought so as not to be construed to give authority for a general warrant.

Seventh. Prompt execution of the warrant must be accomplished.

Eighth. There must be probable cause for the continuation of the order.

Ninth. There must be termination date for order once the conversation sought is obtained.

Tenth. There must be a requirement for notice—apparently within a reasonable time—to the person against whom the order has been issued.

Eleventh. There must be a provision for a return on the order.

While the opinion is critical of the time period authorized in the New York statute—60 days with 30-day renewals—there is no suggestion as to what period might be acceptable if the order related to specific conversations for specific crimes. It is assumed that a 45-day period as provided in S. 2050 would be reasonable as long as the order is related to specific conversations and specific crimes enumerated in the bill.

It would not be possible for a law enforcement official requesting authorization for an interception order to know in advance when the conversation sought will actually occur, with the possible exception of a few isolated instances. Thus, the possibility arises of the interception of unrelated communications.

But extraneous information is also

observed and obtained by a police officer conducting a physical search of a premise or on a continuous "stake out" or "tail" of a person under surveillance. In these situations nonrelated or extraneous information and evidence is not admissible unless it relates to the offense for which the warrant has been issued.

Of course, unrelated conversations would not be admissible evidence and their misuse or disclosure would be subject to prescribed criminal and civil remedies.

In all, every effort has been made to respond to the criteria set forth in the opinion and to develop a proposal, which, if enacted, would comply fully with these requirements.

FEDERAL CRIMINAL REVISION ACT

Finally, Mr. President, I introduce an omnibus measure containing several needed and overdue changes in the procedural provisions of the Federal Criminal Code.

This bill S. 2051, contains six reforms:

First. Authority for a Federal arresting officer to make a reasonable search of the person being arrested as well as the immediate area within the person's presence under four specified conditions;

Second. Authority for Federal enforcement officials to seize property located within an area for which a search warrant has been granted by the appropriate Federal judge or commissioner;

Third. Authority for Federal enforcement officials to make forcible entry without "knocking" if authorized by the appropriate Federal judge or commissioner upon a finding that the property sought may be quickly destroyed;

Fourth. Authority for the Government to appeal from a court order for the return of seized property or to suppress evidence;

Fifth. A general provision granting immunity to witnesses in Federal criminal proceedings in exchange for the compelling of testimony or the production of evidence;

Sixth. A revision and modernization of the present provisions relating to perjury and false statements.

Several of these provisions implement recommendations of the President's Crime Commission. Others carry forward the recommendations of Senate subcommittees which have previously studied these problems.

CONCLUSION

Mr. President, the bills I introduce today are intended to serve a single purpose: To help rid our country of the insidious threat of organized crime. I welcome the support and guidance of all those Senators who share my concern. I welcome the support and counsel of Congressman Richard Poff and his colleagues in the other body who have devoted serious and painstaking study to the subject.

Taken together, the proposals are meant to marshal the best efforts of America's people and its political and social institutions against a common enemy.

The President's Crime Commission has observed that organized crime succeeds only insofar as the Nation permits it to succeed. We can tolerate this blight on our free society no longer.

EXHIBIT 1

[From the U.S. News & World Report, Mar. 28, 1966]

HOW CRIMINALS SOLVE THEIR INVESTMENT PROBLEM

By latest official estimates, organized crime in America is now producing "an annual income of billions."

And the crime bosses, faced with the problem of what to do with their illegal wealth, are moving ever deeper into a variety of legitimate businesses.

The problem is emerging as one of urgent concern to federal, State and local authorities all across the United States.

In recent months, it has been discovered that mobsters with long criminal records are infiltrating multimillion-dollar business enterprises. These include banks and Wall Street brokerage houses, big real estate syndicates, sizable corporations serving the public in many ways.

One clear fact emerges: The underworld's invasion of legitimate enterprise has become big business. Racketeers—many of them associated with the underworld secret society known as the Mafia—now have so much illegally acquired money that they're hard-pressed to find ways to put it to work profitably.

Consequently, much of the criminal world's excess capital is flowing into legitimate fields.

From officials and authoritative sources in Washington and other cities, "U.S. News & World Report" obtained a picture of how organized crime is gaining control of more and more U.S. businesses:

Real estate: In New York City alone, U.S. District Attorney Robert M. Morgenthau estimates, underworld investments in real estate run into "hundreds of millions."

Mafia members are major stockholders in a group operating two famous skyscraper office buildings, according to Mr. Morgenthau. "This is a third-of-a-billion-dollar operation," he said.

One of the alleged participants is a particularly notorious criminal—head of a Mafia "family" blamed for numerous murders. He was one of the hoodlums arrested at a convention of racketeers at Apalachin, N.Y., in November, 1957.

Activities of this real estate group are being probed by the U.S. Senate's Permanent Subcommittee on Investigations, headed by Senator John L. McClellan.

Gangsters also are said to be large holders of shares in one of the best-known skyscrapers in Manhattan.

In New York, at least one well-known hotel is owned outright by criminals, U.S. officials said. Gangsters also own hotels and motels in Miami and Miami Beach, Las Vegas, Detroit, Chicago and other cities. Law-enforcement officers in other large cities throughout the country can name important properties owned by known criminals.

In Tucson, Ariz., two mobsters named before the McClellan Committee as Mafia leaders acquired blocks of downtown business property and acres of other real estate, officials said. Vigorous police action finally drove them out of Tucson.

Another identified leader of the Chicago Mafia has large real estate holdings—including hotels—in Chicago, Las Vegas and other cities.

Banks: Enforcement officials believe racketeers and gamblers have gained a foothold in many large banks through stock purchases. They attempt to use their position as stockholders to obtain special favors—and often succeed.

In Detroit, one medium-sized bank, now under investigation, is owned outright by "the mob," a Washington official said.

"It is known as the 'hoodlums' bank,'" the official stated. "We have reason to believe that it makes unsecured loans to Mafia leaders. It lets them open big accounts through fictitious names or dummies—no questions asked. It has a tieup with large business interests controlled by the Mafia."

In Miami, an almost identical situation i said to exist in a bank, also under officia scrutiny. And in New York City alleged gangster control of at least two banks i being investigated.

"We have evidence of one bank officer making highly questionable loans to Eastern racketeers," a Justice Department officia said.

As far back as 1950, the Senate Investigating Committee headed by the late Senator Estes Kefauver learned that a New Jersey gambling ring had bought a large block o stock in a New York bank. Thereafter, i used this bank as its clearing house fo checks obtained in payment of gambling losses. These checks ran into millions o dollars.

A Chicago police official told the Committee: "In the past few years they [criminals] are becoming very active in the finance industry, particularly in small-loan companies in banks."

Securities: Official files are bulging wit instances—including convictions—of penetration of brokerage offices by gang-connected racketeers. Some involve firms with previously spotless reputations. Others ar "boiler room" operations, set up to unload worthless stocks through high-pressure sale tactics.

"All in all," a Washington official said "frauds in which the underworld and th financial world are linked have bilked th public of many millions."

Sometimes the "stocks" peddled by racketeers through brokerage offices are worthless certificates in nonexistent companies.

One Brooklyn mobster, sentenced to jai for frauds in connection with Wall Stree operations, also has interests in real estat and other "legitimate" businesses. Amon other things, investigators say, he manufactures appliances that are sold through labor union's medical fund.

Recently, federal investigators have begun looking closely at every case involving major financial scandal. They have foun links to the Mafia or to Las Vegas gambling interests in many multimillion-dollar frauds.

Garment industry: The dress-manufacturing business, centered in New York, long ha been known to be overrun with racketeers. Many have become millionaires.

Investigators attribute these successful operations to the fact that many of these racketeers run nonunion shops. This keeps the costs well below those of nonracketeer competitors.

The racketeers keep the unions out of thei shops, investigators say, by hiring Mafia kil ers and strong-arm men as "labor consultants."

U.S. Attorney Morgenthau, with the aid c the Federal Bureau of Investigation, pre sented evidence recently to a federal gran jury on New York Mafia activities. One c his main cases involves an alleged Mafia bo who owns interests in a string of dress fac tories in New York and Scranton, Pa., an is said to be a multimillionaire.

Other businesses: As the chart on this pa shows, mobsters are in many legitimate bus nesses. So far as is known, they have n taken over large industries such as heav manufacturing. But, from time to time, th underworld manages to penetrate the fring of heavy industry.

A number of years ago, the Kefauver Com mittee discovered, mobsters from Clevelan Ohio, put up part of the money to finance merger of two steel companies. This unde world association since is said to have bee dissolved.

A leading auto manufacturer, "U.S. Nev & World Report" was told, has been able cut its former ties with a car-hauling company in which a New Jersey gangster was a major owner.

One alleged leader of the Detroit Mafia at one time had a close connection with a stove works in Detroit. He also had a lucrative contract for the factory's scrap metal. He now is in the auto-wash and filling-station business.

Sudden emergence of sons or sons-in-law of Detroit Mafia racketeers as contractors for scrap-metal handling at big Detroit plants is commonplace.

In Detroit alone, Mafia members have infiltrated legitimate businesses worth at least 50 million dollars, George Edwards, then police commissioner of that city, told the McClellan Committee. He named 98 businesses which can be traced to the Mafia. Many of the Mafia leaders live in Grosse Pointe, a residential district favored by Detroit's top industrialists.

A figure named by police as one of the five "dons" who comprise the Mafia's ruling council in Detroit has many legitimate business connections. These include a wholesale produce company with gross annual sales in the millions, a large baking company, a coach line, and a large beer distributorship.

Commissioner Edwards also named a race track operating near Detroit, and testified: "We think there is a major influence on [the race track] from the top echelon of the Mafia, and that some of the proceeds of this million-dollar-a-year operation undoubtedly are available for Mafia purposes."

The fields of entertainment and sports—big business in the U.S.—also are heavily infiltrated by the underworld, a Justice Department aide said.

Hoodlums—who are they? Who are these hoodlums who have invaded U.S. business? How do they operate?

The Mafia and other criminal gangs exist in every sizable city in America. New York, Chicago, Philadelphia, Detroit, Cleveland, St. Louis, Boston, New Orleans, Pittsburgh, Buffalo, Kansas City, Miami and Miami Beach, Tampa, Providence and Las Vegas are known to investigators as the centers.

Many of the richest gangsters of today made their millions in the old prohibition days. Then repeal and income tax prosecutions ended that era.

Now the big money in crime, officials say, is made in gambling, narcotics and "loan-sharking"—the lending of money at extortionate interest rates. These illegal activities provide the billions which the underworld is funneling into legitimate business.

When a businessman falls behind on his payments to a loan shark, the gangster often simply takes over the business.

The new image: In the new world of gangster-businessman operations, the gangster has taken on a new image. As a rule, the top-level gangster no longer is a crude, flashily dressed, fast-living character. More often, he wears Ivy League suits. He lives quietly, often in the best residential communities, and sends his children to select colleges. Sometimes he hires public-relations firms to add luster to his image.

"We have 50 important Mafia leaders living in Nassau County on Long Island," District Attorney William Cahn told "U.S. News & World Report." "They live, circumspectly, in homes costing upward of $75,000. They take part in civic projects and are liberal with their charitable contributions.

"They all claim they are respectable businessmen. Until we began exposing them, many citizens did not know that they were narcotics pushers, gamblers, labor racketeers, blackmailers and panderers, with hired killers to do their dirty work."

Officials say that criminals often have "devious reasons" for entering legitimate businesses. Often they want the business as a respectable "front" for their illegal activities.

"Criminals are smarter now about income tax matters," an investigator said. "They try to show enough 'legitimate' income on their tax returns to cover up their illegal income and keep out of trouble."

War on crime: Director J. Edgar Hoover of the FBI views the underworld's vast invasion of the legitimate business world as a menace. He says it enables criminals to gain a "respectable front" for their illicit activities.

Within the Department of Justice, Attorney General Robert F. Kennedy has strengthened the organized crime and racketeering section of the criminal division. An intelligence unit has been set up. It draws on the resources of more than 26 federal enforcement agencies. These include the FBI, the Securities and Exchange Commission, and the Treasury Department, including the Internal Revenue Service, Secret Service, Narcotics Bureau and Customs.

Selected police departments throughout the country also co-operate. In return, they receive information from the Government.

"We keep track of 1,100 racketeers," says William G. Hundley, chief of the rackets section.

Thus, a constant battle is being pressed forward by the nation's law-enforcement agencies. Its aim: to bring under control what the U.S. Attorney General calls "the increasing encroachment of the big businessmen of the rackets into legitimate business."

Here is a list—gathered by U.S. News & World Report from official sources—of the types of legitimate business in the U.S. invaded by organized crime:

Banks, stockbrokers and real estate operations, including management of office buildings, apartment houses, residences and commercial property.

Hotels, motels and restaurants.

Mortgage and loan companies, factoring firms, insurance brokers.

Interstate and local trucking, interstate automotive hauling, leasing of trucks, cars, charter boats, automobile and truck sales, bus lines, taxicabs, garages, filling stations, parking lots, car-wash companies.

Ranching and farming, riding stables.

Construction, housewrecking, paving, engineering, hoisting, plumbing, carting, garbage and waste removal, landscaping, coal and fuel oil, exporting, metal shops, aluminum siding, die-casting, cable companies, scrap metal, waste paper, upholstering.

Women's and men's clothing manufacturing, undergarments, draperies, awnings, carpets, linen supply, optical goods, prefabricated doors, aluminum storm windows, miscellaneous manufacturing.

Vending and coin-machine operations—especially cigarettes and juke boxes. Also, companies which distribute records to juke boxes, and small recording companies.

Entertainment and sports, through management of performers and athletes, theatrical agencies, and ownership of night clubs and bars. Also, drive-in theaters, race tracks, bowling alleys, pool halls, hat-check concessions in clubs and theaters.

Liquor, beer and wines, wholesale and retail; breweries, nonalcoholic beverages.

Cheese, olive-oil and coffee importing; fruit juices and dairy products, vegetables, meats, fish, bakery products, pizzas, and other foods, wholesale and retail.

Newspaper distribution, photographic processing and supplies, printing plants, cigarette-sales centers, laundries, dry cleaners, barber shops, barber and beauty-supply houses, novelties, antiques, miscellaneous retail shops.

Trade schools and barber colleges, travel agencies, funeral parlors.

One gangster-undertaker is believed to have used his funeral limousines for illegal activities.

Known criminals also have bought heavily into a wide variety of large publicly owned corporations through stock purchases.

Mr. PERCY. Mr. President, will the Senator from Nebraska yield?

Mr. HRUSKA. I am happy to yield to the Senator from Illinois.

Mr. PERCY. I should like to ask a question, prefaced by a statement.

Having lived all my life in the city of Chicago, Cook County, that has been beset with problems of organized crime, I am deeply concerned by the organized crime problem. I understand the profits from gambling alone, available to the criminal elements of this country, are in excess of $6 billion a year, a figure which exceeds the combined profits of the three largest corporations in this country. Essentially they are tax-free profits.

Does the Senator from Nebraska feel that the pendulum of our system of criminal justice has swung too far away from the public's right to protection from the criminal element?

Mr. HRUSKA. There has been thinking that perhaps that is the case.

It is difficult, of course, to assess the entire situation; but we find example after example of cases where the theoretical, legalistic, constitutional rights of an individual are pressed to a point that leaves the community and the public at large almost helpless in certain areas. There seems to be a firm foundation for believing that the Senator is justified in asking that question, and that the answer would be in the affirmative.

There has been a loss of balance, in the judgment of many students of this problem, between the rights of the individual on the one hand and the right of survival of society on the other.

Mr. PERCY. Will the Senator from Nebraska yield for a brief comment on those remarks?

Mr. HRUSKA. I certainly will.

Mr. PERCY. I agree with the Senator's answer, and I would state that while I am in sympathy with the administration's approach, to provide Federal aid programs to help local law enforcement, it is not enough to simply throw money at the crime problem. In my opinion no defendant has a right to be tried under an unbalanced, often outdated system of laws. Now, in the judgment of the Senator from Nebraska, is not the objective of the Criminal Procedure Revision Act we are introducing today to balance society's right to enforcement of its criminal laws?

Mr. HRUSKA. That is correct. That is its principal thrust. In the near future we shall have hearings before the Subcommittee on Criminal Laws and Procedures. These hearings are scheduled, Mr. President, during the week of July 10. That thrust will have a substantial impact on the direction of the testimony to be heard.

Mr. PERCY. I commend the distinguished Senator from Nebraska [Mr. HRUSKA] for his incisive statement. I am happy to have been associated with him in the effort to perfect a series of bills which take effective aim on the large but elusive target of organized crime in America. As one who represents an area which in both legend and fact is a stronghold of the nationwide crime syndicate, I commend also the distinguished Senator from Arkansas [Mr. MCCLELLAN], whose work in this area with that of his Investigations Subcommittee has been indispensible to what progress has been made in recent years in attempting to curb the activities of organized crime.

Mr. President, I ask unanimous consent that an address by Mr. Lewis F. Powell, Jr., be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. PERCY. Mr. Powell, a former president of the American Bar Association and a member of the President's Commission on Law Enforcement and Administration of Justice, delivered these remarks at a recent meeting of the business council at Hot Springs, Va. A member of the Organized Crime Task Force Panel of the Commission, Mr. Powell concludes in his speech that—

> The greatest crime challenge to our free society is organized crime.

One illustration he includes to support this thesis is worthy of special attention: the estimated annual profit to organized crime from gambling alone—at $6 to $7 billion per year—is greater than the combined net profits of our three largest corporations.

Mr. President, one has only to pick up the paper, in my own city of Chicago or almost anywhere, to read in detail of the activities of the leaders of the organized crime syndicate. They are walking examples of an increasingly prevalent view, among many of our youth, that crime may well pay.

Responsibility for particular crimes can be traced to the door of the syndicate, where abruptly the trail disappears behind the ironbound security of a highly disciplined organization. Frequently, the terrorist or killer involved is well known to police through underground information. But the word of the grapevine—however reliable—is not evidence, and gangland convictions are exceedingly hard to come by. Our methods of procuring reliable evidence, therefore, must be modernized and made more effective.

Consider but one example of Chicago's organized crime problem. Since 1919 there have been over 1,000 unsolved gangland killings. Compare this with the national statistics that 91 percent of all murders are cleared through arrest, and you can better understand that a threat of violence from the syndicate implies a swift, sure sanction if compliance with syndicate orders is not forthcoming.

In March 1966, the President of the United States made an arresting statement to the Congress and the Nation in a special message on crime:

> The most flagrant manifestation of crime in America is organized crime. It erodes our very system of justice—in all spheres of government. It is bad enough for individuals to turn to crime because they are misguided or desperate. It is intolerable that corporations of corruption should systematically flaunt our laws.

This year the President's Commission on Law Enforcement and Administration of Justice issued a landmark document on the nature and scope of organized crime. Anyone who reads chapter 7 of the Commission's report, and studies the subsequent Task Force Report on Organized Crime should be sobered by the detailed description of a nationwide outlaw government that divides the country into areas, from which select groups or families have an exclusive on terror and plunder.

Notwithstanding these and other similar expressions of concern, Mr. President, the Commission's report concluded—at page 200:

> Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups.

The President, in his message, "The War on Crime" and in the legislation introduced to prosecute that war dealt principally with Federal assistance to State and local law enforcement.

The legislative proposals I have sponsored today—and may I state that I am reserving judgment at this time on the electronic surveillance measure—are designed to make more effective the battle against organized crime. They should be subjected to the most careful scrutiny by the Members of the Senate. The Criminal Procedure Revision Act follows closely the recommendations of the President's Commission which are fully documented in the Commission report, chapter 7. The proposals to bring the antitrust laws to bear on the organized crime menace, and respond to present methods of syndicate operation.

If this Nation can spend $25 billion a year to better assure freedom of political choice for 14 million people of South Vietnam, 11,000 miles from our shores, it can afford to spend more ingenuity and financial and human resources to provide a greater freedom from fear for over 193 million people right here at home.

Mr. President, I yield the floor.

EXHIBIT 1

ORGANIZED CRIME—CHALLENGE TO A FREE SOCIETY

In a message announcing the creation of the National Crime Commission in 1965,[1] the President said: "Crime has become a malignant enemy in America's midst".

[illegible]

In this, and in subsequent addresses the President has emphasized the now familiar—and shameful—facts. There has never been a time when there were more serious crimes against persons and property. Crime is increasing several times faster than population growth. Juvenile crime is a national disgrace, with nearly 50% of all arrests involving youths 18 years of age and under.

More than two and three-quarter million serious crimes were reported in 1965, and this startling figure is grossly understated because for every crime which makes the record books there are two or more which remain unreported.

The statistics of crime only become meaningful in terms of people. The President has said that "crime—the fact of crime and the fear of crime—marks the life of every American". There are the victims who suffer injury, loss of property, and even death. There is also the staggering economic loss to our nation.

Perhaps the most degrading effect of mounting crime is the fear which it generates. Citizens are afraid to walk the streets at night. Our public parks are often deserted. It has been said, without too much exaggeration, that fear of crime is turning us into a nation of captives "imprisoned behind chained doors, double locks and barred windows".

It is paradoxical indeed that these conditions exist in America today. We enjoy more prosperity, more productivity, more education and more progress in science and technology—than at any other time in all history. Nor are we concerned only with material things. There is more genuine concern by man for his fellow man, more determined efforts to wipe out poverty and disease, and far more progress in minimizing discrimination and injustice—than at any other time in all history.

Yet, despite this unprecedented material progress and the equally unprecedented humanizing of our attitudes toward less fortunate people, the crime rate continues to spiral upward. At the same time, there is a disquieting eroding of respect for law and due process.

This, in capsule summary, is the situation which prompted the creation of the President's Commission. The task assigned, of determining causes and proposing solutions, was obviously impossible in any absolute sense. There is no more complex problem confronting mankind, and it is by no means unique to our country.

THE COMMISSION'S REPORT

The Commission, with 19 members, 63 staff members, and more than 200 consultants, and with the assistance of the FBI and other agencies of government, worked intensively for a period of 18 months. A massive report was submitted to the President in February 1967.

The Report makes some 200 specific recommendations—steps which could lead to a safer and more just society. They relate to basic changes in the operations of police, the courts and our system of corrections. They deal with juvenile delinquency.[2] They call for far greater anti-crime effort by government at all levels and all citizens.

But this is hardly the occasion to discuss detailed recommendations. Rather, it seems more useful to consider a specific major problem. The greatest crime challenge to our free society is organized crime. I thought it might be of special interest to this distinguished group to consider this particular challenge.

ORGANIZED CRIME

Despite Congressional investigations and much talk, the public generally has only the vaguest conception of organized crime, what it is, and what it does. The term evokes, for the average person of our generation, an image of gang warfare (largely in Chicago) and perhaps of Al Capone being sent to jail for income tax violation because the law was too bumbling to convict him of murder and extortion.

The difficulty is that organized crime is largely invisible. The Commission described it as:

"An organized society that 'operates outside of the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to (private) laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining con-

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[1] The Commission's legal name is "National Commission on Law Enforcement and the Administration of Justice".

[2] The recommendation for Youth Service Bureaus is one hopeful result of this study.

NO. 2

ORGANIZED CRIME IN THE UNITED STATES

Mr. McCLELLAN. Mr. President, on January 15, 1969, I introduced S. 30, the "Organized Crime Control Act of 1969," which was cosponsored by the Senator from Nebraska (Mr. HRUSKA) and the Senator from North Carolina (Mr. ERVIN). At that time, I indicated that I would at a later date discuss the subject of the growth of organized crime in the United States and explain in greater detail the provisions of S. 30.

At this point, Mr. President, I ask unanimous consent that, at the next printing of the bill, the name of the distinguished Senator from Alabama (Mr. ALLEN) be added as a cosponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

I. DEVELOPMENT OF ORGANIZED CRIME

Mr. McCLELLAN. Mr. President, Americans have had to contend with some form of organized crime since the founding of our Republic. We tend to forget, or perhaps romanticize, the early pirates, the revolutionary smugglers, the 19th-century frontier marauders, and the mobs of our fledgling cities, but we must not forget that these groups were the frontrunners of today's sprawling criminal cartels.

The late 19th and early 20th centuries, moreover, saw the rise of the great citywide gang combinations and the intense rivalry of these groups which led to open gang wars in the era of prohibition. As important as these early beginnings were, nevertheless, it remained for Charles "Lucky" Luciano, the great consolidator, to bring the various factions together, and, through the unique strength of La Cosa Nostra's familylike structure, forge the confederation that today is dominant in organized crime everywhere. And it is this confederation, which today epitomizes, if it does not exhaust, the concept of organized crime, that must be understood if organized crime in the United States is to be understood.

II. INTERNAL STRUCTURE OF ORGANIZED CRIME

The most influential core groups of organized crime, the "families" of La Cosa Nostra, operate in New York, New Jersey, Illinois, Louisiana, Michigan, Pennsylvania, and Rhode Island. Director of the Federal Bureau of Investigation, J. Edgar Hoover, has estimated overall strength of these groups at 5,000, of which 2,000 are in the New York area alone. These groups, coupled with their allies and employees, constitute the heart of organized crime in the United States at this time.

Mr. President, I ask unanimous consent that a chart, listing the principal "families" by the name of the leader and area of activity, be printed as exhibit 1 in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. McCLELLAN. Each of these 22 core groups is known as a "family." Membership varies from 700 down to 20. Most cities have only one family; New York City has five. Family organization is rationally designed with an integrated set of positions geared to maximize profits and to protect its members—particularly its leadership—from law enforcement activity. Unlike the criminal gangs of the past, the organization functions regardless of individual personnel changes; no one individual is indispensable. The killing of Jesse, for example, virtually ended the James gang; the deportation of Luciano merely resulted in the leadership of his New York family passing to Vito Genovese, who only recently died in a Federal prison.

The hierarchical structure of the families closely parallels that of Mafia groups that operated for almost a century on the island of Sicily. Each family is headed by a "boss," whose primary functions are the maintenance of order and the maximization of profit. Beneath each boss is an "underboss." He collects information for the boss; he relays messages to him and passes his instructions to underlings. On the same level with the underboss is the "consigliere," who is often an elder member of the family, partially retired, whose judgment is valued. Below him are the "caporegime," who serve either as buffers between top men and lower level personnel or as chiefs of operating units. As buffers, they are used to maintain insulation from the investigative procedures of the police. To maintain their insulation, the leaders avoid direct communication with the workers. All commands, information, complaints, and money flow back and forth through buffers.

The need to be able to intercept or

overhear these otherwise inaccessible communications, as it is now permitted under title III of the Omnibus Crime Control Act of 1968, is abundantly clear, for the leaders perform no criminal overt acts that can be witnessed by the police or citizens, who are not involved themselves. Live testimony from insiders is rare and incriminating documents are seldom kept or rarely accessible. Therefore, some substitute, such as the product of electronic surveillance, is crucial. I am thus heartened that the new Attorney General has promised to reverse the policy of his predecessor and to use this anticrime weapon that Congress enacted last year.

I am concerned, however, that the decision of the Supreme Court yesterday, in Alderisio against the United States, may have the tendency—if not the effect—to destroy the efficacy of this method of detection and of gathering evidence. I hope that is not the purpose and the intent of the Court. I hope, too, that title III of the omnibus crime bill of last year will be held valid and that this instrumentality will be made available to our law enforcement officials, particularly for use in combating organized and syndicated crime. I shall on a later occasion discuss what, if any, legislative action is open to use to mitigate the possible harmful effects of the case.

Below the caporegime are the "soldati" or the "button" men. They actually operate the particular illicit enterprise, using as their employees the street-level personnel of organized crime. These employees, however, have little insulation from the traditional police operations of patrol and detection. They are those who are most often arrested, for, as the President's Crime Commission noted, they "take bets, drive trucks, answer telephones, sell narcotics, tend the stills, work in the stills, or operate legitimate businesses."

There is a tendency to view organized crime as embracing only those groups engaged in gambling, narcotics, loan sharking, or other illegal businesses. This is useful since it distinguishes ad hoc youth gangs, groups of pickpockets, and professional criminals generally. Nevertheless, there are at least two aspects of high level organized crime that characterize it as a unique form of criminal activity. To this degree, the nature of organized crime is independent of any particular criminal activity.

Two positions in the organized crime group make it substantially different from other criminal operations: the "enforcer" and the "corruptor." Other criminal groups that operate together over a period of time may allocate functions among particular members. But these two positions are not routinely found in other criminal groupings. It is on this basis, therefore, that organized crime groups differ from professional criminal groups generally; it is on this basis, too, that the unique challenge presented by organized crime must be evaluated.

The "enforcer's" duty is to maintain organizational integrity by arranging for the maiming and killing of recalcitrant members or potential witnesses against the group. J. Edgar Hoover, for example, testified about a "particular case where they kidnaped a man they thought was not to be trusted." He said:

> They hung him on a butcher's hook for three days and tortured him until he died.

Today, however, most of the destructive energies of organized crime are no longer dissipated on internal strife; they are concentrated on its outside enemies. The scope of the violence for which organized crime has been responsible is aptly illustrated by the number of known gangland killings in Chicago. Since 1919, there have been over 1,000 such murders, and while the police clearance rate for homicides generally approaches 90 percent, here only a handful have been solved. This is an intolerable degree of immunity from legal accountability. Judge J. Edward Lumbard was right when he observed that this state of affairs denies to the law abiding "due process of law."

The "corruptor," on the other hand, seeks to establish relations with those public officials and other influential persons whose assistance is necessary to achieve the organization's overall goals. Through these positions, each group seeks to guarantee its continuing existence. Each represents a defense mechanism against the various attempts of society to control the group. Viewed negatively, these functions protect the group; viewed positively, these functions threaten society.

The highest ruling body of the 22 families is the commission. This body serves as a combination legislature, supreme court, board of directors, and arbitration panel. The commission is the ultimate authority on organizational and jurisdictional disputes. Only the Nation's most powerful families compose it, but it has authority over all. Its composition has varied from nine to 12 men. Currently, seven families are represented: three from New York City, one each from Philadelphia, Buffalo, Detroit, and Chicago. The commission is not a representative or elected body. Members are not equals. Those with longer tenure, larger families, or greater wealth, all exercise more authority and command greater respect.

III. GAMBLING

Organized crime, which has, of course, never limited itself to one particular activity, finds its greatest source of revenue today in syndicated gambling. Its estimated annual net take is placed at $7 billion.

Professional gambling ranges from simple lotteries to bookmaking on horse or sports events. Most large slum areas, for example, have within them some form of a lottery known as numbers. Bets are placed on any three-digit numbers from one to 1,000. The mathematical odds of winning are 1,000 to one. Yet seldom, however, is the payoff over 500 to one, and then, on cut numbers, which are played more frequently than others, usually for superstitious reasons, it is even less. The gambler thus seldom gambles. In addition, he hedges his bet by a complicated layoff system. Assuming an honest payoff—often not the case—the ultimate effect of the racket is to drain the work income of slum residents away from food, clothing, shelter, health, and education.

The professional bookmaker, on the other hand, has at least the virtue of exploiting primarily those who can afford it. Yet he seldom gambles either. He gives track odds or less without track expenses, pays no taxes, is invariably better capitalized or "lays off" a certain percentage of his bets with other gamblers, takes credit bets to stimulate the play, and finally may even fix the event by corrupting private and professional sports.

Police enforcement of existing laws against the gambling operator is widely hampered by the use of such innovations as "flash paper." Records of gambling operations are often kept on this highly combustible paper which is immediately ignited with the touch of a cigarette. I note, too, that the U.S. Navy is only now placing some of its classified documents on paper of this type, which instead of igniting, dissolves when placed in water. Called "rice paper," its use has been common in organized crime gambling activity for years. It is surely an ironic commentary on our National Government that the forces of organized crime could be considered either technologically more advanced or more innovative.

IV. NARCOTICS

Next to professional gambling, most law-enforcement officials agree that the importation and distribution of narcotics, chiefly heroin, is organized crime's major illegal activity. Its estimated take is $350 million a year. More than one-half of the known heroin users are in New York City. Others are located primarily in our other large metropolitan areas, including Chicago, Los Angeles, Detroit, Philadelphia, Baltimore, Newark, and, as we all know only too well, Washington, D.C. Within the cities, addiction is generally concentrated in areas with low average income, poor housing and high delinquency rates. The addict himself is likely to be male, 21 to 30, poorly educated, unskilled, and a member of a disadvantaged minority group. Addiction today, unlike yesterday, is largely a disease of the decaying inner city. The death toll from narcotics in New York City alone runs over 100 per year.

Nevertheless, Mr. President, more than the addict himself is involved. The cost of narcotics varies, but it is seldom low enough to permit the typical addict to obtain the money for drugs by lawful means. Estimates of the percentage of the street theft in our large cities caused by addiction run to 50 percent; although the figure cannot be accurately assessed, it is clear that it is high. Thus, addiction in the ghetto seriously affects the quality of life in the whole city.

Recent surveys of attitudes of people living in the Harlem and Watts areas of New York City and Los Angeles, for example, ranked crime and drug addiction with housing and economic conditions as the most serious problems faced in the ghetto.

There is, of course, a need for social action in the direction of the medical and psychological treatment of the addict himself and the general improvement of the social environment that helps to produce him. In recognition of this need, I introduced 3 years ago S. 2191, which became the Narcotic Addict Rehabilitation Act of 1966. Although two-thirds of the men and 90 percent of the women now serving time here in the District are addicts, for the most part hooked on heroin, little has been done to implement this act. Myrl Alexander, of the Federal prison system, puts at 600 cases per year the estimated annual commitment ability under this act, yet the program took in only 305 individuals from October 1967 through June 1968. It certainly has not received the kind of priority treatment we might have expected. As with title III's grant of wiretapping authority, the Department of Justice has indeed picked and chosen what it would implement.

The narcotic traffic on the east coast is run by organized crime, and the product is European in origin. Grown in Turkey, diverted from legitimate markets, refined in the Near East and France, the heroin is finally smuggled into the United States. The importers, generally top men in organized crime, do not handle and seldom see a shipment of heroin; their role is strictly supervisory and financial. Note, again, the absence of overt criminal acts subject to observation using traditional patrol or detective techniques of investigation. Fear of retribution, which can be swift and final, and a code of silence protect them from exposure. Through persons working under their direction, the heroin is distributed to high-level wholesalers; low-level wholesalers are at the next echelon; finally, pushers, often addicts, and the addicts themselves make up the last rung. Law enforcement is at all levels difficult, most difficult at the highest. The classic police functions of patrol and detection, traditionally understood, have had little impact on the traffic. Dangerous undercover operations and the use of informants, who work from the inside, are essential. The top men are hard to identify; they always have a shield of people in front of them, and by not handling the drugs, they incur no direct liability for possession, sale, or other prohibited acts. Generally, they are vulnerable only through the conspiracy laws, and this requires live testimony of an insider or a substitute. There are no overt acts for the police or citizens, otherwise not involved, normally to observe.

V. LOAN SHARKING

Most law-enforcement officials agree that loan sharking is organized crime's next major illegal activity. Its estimated take is $350 million a year. Like narcotics, loan sharking is organized in a hierarchial structure. At the top is the boss who lends to trusted lieutenants large sums of cash usually at the rate of 1 percent per week. Under the lieutenants are street-level loan sharks, who deal directly with the debtors. The rate varies, but is normally 5 percent per week. Occasionally, the lieutenant will make large loans himself—in the neighborhood of $1 million. The setup also involves "steerers," who will direct possible borrowers to the loan sharks. These individuals can be anyone who comes into contact with large numbers of people.

Finally, there is the "enforcer," who sees to it that the debts are paid. The victims of loan sharks come from all segments of society: The professional man, the industrialist—particularly in the areas of high competition like the garment industry—contractors, stock brokers, bar and restaurant owners, dockworkers, laborers, narcotic addicts, bettors, and bookmakers themselves. There is an indication, too, that the loan shark, through his financing services, makes possible many of the activities of professional criminals not directly associated with organized crime. The professional, moreover, accounts for a substantial proportion of certain categories of so-called "street crime," particularly theft. Again, we see the close relation between street and organized crime.

Only two prerequisites are required to make anyone a potential victim of a loan shark: a pressing need for ready cash and no access to regular channels of credit—thus demonstrating the exploitive character of organized crime. Repayment is compelled by force. Often debtors in over their heads are pressed into criminal acts to pay off, including embezzlement, acting as a numbers writer, or a fingerman for a burglary ring.

VI. INFILTRATION OF LEGITIMATE BUSINESS

Legitimate business is another area into which organized crime has begun most recently and widely to extend its influence. In most cities, it now dominates the fields of jukebox and vending machine distribution. Laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded and taken over. The Special Senate Committee To Investigate Organized Crime in Interstate Commerce, under the leadership of Senator Estes Kefauver, noted in 1952 that the following industries had been invaded: advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drugstores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, jukebox, laundry, liquor, loan, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap shipping, steel surplus, television, theaters, and transportation.

Often it is the small or marginal businessman who is most easily subject to invasion by organized crime. Organized crime seems to act like a vulture that preys on those otherwise made vulnerable by many of the economic developments of the last half century. It is most disturbing, however, to hear, as we have recently from New York Stock Exchange President Robert W. Haack, that there is a question whether or not organized crime may have begun to penetrate securities firms and the stock exchange itself. Apparently, no area of business activity is immune from its grasping claws.

Control of business concerns has been acquired by the sub-rosa investment of profits acquired from illegal ventures, accepting business interests in payment of gambling or loan shark debts, but, most often, by using various forms of extortion. Usually, after takeover, such defaulted loans are liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques, which are called "scam." An estimated 250 such scam operations are pulled off each year, netting around $200,000 per job. Often, however, the organization, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful, the organization begins to extract a premium price from customers. Purchases by infiltrated businesses are always made from specified allied firms. With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can be effectively eliminated and customers can be effectively confined to sponsored suppliers. The result is more unwholesome than other monopolies because the newly dominated concern's position does not rest on economic superiority.

VII. TAKEOVER OF LEGITIMATE UNIONS

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. All of this, of course, makes a mockery of much of the promise of the social legislation of the last half century.

VIII. SUBVERSION OF DEMOCRATIC PROCESSES

To exist and to increase its profits, Mr. President, organized crime has found it necessary to corrupt the institutions of our democratic processes, something no society can long tolerate. Today's corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition and earlier eras. Organized crime operates even in the face of honest law enforcement, but it flourishes best in a climate of corruption. As the scope of organized crime's activities has expanded, its efforts to corrupt public officials at every level of government have grown. For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen. The potential for harm today is thus greater if only because the scope of governmental activity is greater.

At various times, organized crime has been the dominant political force in such metropolitan centers as New York, Chicago, Miami, and New Orleans. Only fortuitous circumstances prevented its takeover of Portland, Oreg., and Kansas City, Mo. Smaller communities such as Cicero, Ill., and Reading, Pa., have been virtual baronies of organized crime. This list of examples could be extended almost indefinitely.

A political leader, legislator, police officer, prosecutor, or judge who owes allegiance to organized crime cannot render proper service to the public. Such an individual is no longer a public servant, selected by and accountable to the people, as democracy demands; he is the servant of a small class of professional criminals. Accustomed to accepting bribes from a criminal organization, such public servants will soon begin to expect side payments for acts done in the usual course of business. Such an official will soon lose any sense of allegiance to the public or to the moral standards which good government demands.

IX. UNDERMINING THE SOCIAL STRUCTURE

Organized crime seriously affects the quality of American life in yet another way. Mr. Justice Brandeis in his classic dissent in *Olmstead* v. *United States* (277 U.S. 438, 485 (1928), rightly suggested:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

Justice Brandeis spoke in the context of lawless law enforcement. There is, however, another way in which government teaches by example. Its failures, too, do not go unnoticed, especially among the young, who see what we do and seldom listen to what we say. Unlike other successful criminals who operate outside of an organization and who require anonymity for success, the top men in organized crime are well known both to law enforcement agencies and to the public. In earlier stages of their careers, they may have been touched by law enforcement, but once they attain top positions in the rackets, they acquire a high degree of immunity from legal accountability. The National Advisory Commission on Civil Disorders described the impact of this process on the child of the ghetto in these terms:

> With the father absent and the mother working, many ghetto children spend the bulk of their time on the streets—the streets of a crime-ridden, violence prone and poverty-stricken world. The image of success in this world is not that of the "solid citizen," the responsible husband and father, but rather that of the "hustler" who takes care of himself by exploiting others. The dope seller and the numbers runner are the "successful" men because their earnings far outstrip those men who try to climb the economic ladder in honest ways.
>
> Young people in the ghetto are acutely conscious of a system which appears to offer rewards to those who illegally exploit others, and failure to those who struggle under traditional responsibilities. Under these circumstances, many adopt exploitation and the "hustle" as a way of life, disclaiming both work and marriage in favor of casual and temporary liaisons. This pattern reinforces itself from one generation to the next, creating a "culture of poverty" and an ingrained cynicism about society and its institutions.

As part of organized crime, an ambitious young man thus knows that he can rise from bodyguard and hood to pillar of the community, giving to charities dispensing political favors, sending his boys to West Point and his girls to debutante balls. The result of all of this was summed up by the President's Crime Commission in these terms:

> In many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated by subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society. As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continuous defiance of the law, they preach a sermon that all too many Americans heed: The government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality a trap for suckers.

Mr. President, if we do not reverse the trend of growth of the menace to our society, it, an enemy within, will surely destroy us.

X. LAW ENFORCEMENT

Mr. President, up until this point, I have discussed the development and impact of organized crime in the United States. I should now like to turn my attention to the attempts of law enforcement, chiefly the Federal effort, to arrest and reverse its growth.

To understand the administration of criminal justice in our Nation today, we must first understand the problems of the administration of justice in a stable, homogeneous, pioneer, primarily agricultural community of the first half of the 19th century and the difficulties involved in meeting those problems with the legal doctrines and institutions inherited from 17th- and 18th-century England. We must then understand the problems of the administration of justice in our mobile, modern, heterogeneous, urban, industrial community of today and the difficulties involved in meeting those problems with legal doctrines and legal institutions first inherited from England and then adapted to an American society of the last century.

We inherited from England a medieval system of sheriffs, coroners, and constables, devised originally for a rural society, but easily adapted to pioneer rural conditions. We had no professional police force then. Its emergence, moreover, was slow. The Colonies at first adopted the British constabulary-night watch system, which consisted of isolated constables in the daytime and night watchmen in the evening. Not until 1844 was a unified day and night police force established, first in New York City. The primary function of these police force officers was patrol, the maintenance of peace and order on the street.

In a simpler society, offenses normally occurred between neighbors. No specialized law enforcement force system was necessary to bring them into the administration of justice. The President's Crime Commission put it this way:

> In the preindustrial age, village societies were closely integrated. Everyone knew everyone else's affairs and character; the laws and rules of society were generally familiar and were identical with the moral and ethical precepts taught by parents, school masters, and the church. If not by the clergy and the village elders, the peace was kept, more or less informally, by law magistrates (usually local squires) and constables. These in the beginning were merely the magistrates' agents, literally "citizens on duty"—the able-bodied men of the community serving in turn. Not until the 19th century did policing even have a distinct name. Until then it would have been largely impossible to distinguish between informal peacekeeping and the formal system of law enforcement and criminal justice. The real outlaws—murderers, highwaymen and their ilk—were handled mostly by the military when normal procedures for crime control were unsuccessful.

This is, of course, not true today. When the patrol force fails to prevent a crime, or apprehend the offender during its commission, the police must rely instead upon investigation: The detective function, whose development, too, has been slow. It was not, for example, until 1842, 13 years after the formation of the Metropolitan Police in England, that a small body was detached for detective work, and not until 1878 that the Criminal Investigation Department was formally created. The use of the tools of science, moreover, has only become common within the last half century. Even so, scientific crime detection, as the President's Crime Commission noted, "popular fiction to the contrary notwithstanding, at present is a limited tool." Every sizable department today thus has a corps of investigative specialists whose job it is to solve crimes by questioning victims, suspects, and witnesses and by accumulating physical evidence at the scene of the crime. Yet note that the model around which the patrol and detective functions have developed has been essentially the traditional common law crimes such as murder, rape, robbery, larceny, and the rest, which usually occur as a single incident, not in any way part of an overall course of criminal activity. It is around these offenses, too, that our criminal law and procedure has evolved. These developments, in addition, have been colored by yet another important factor.

When we began to build an American criminal law with received English materials, as Dean Roscoe Pound has rightly observed:

> The memory of the contests between courts and crown in 17th century England, of the abuse of prosecutions by Stuart Kings, and of the extent to which criminal law might be used as an agency of religious persecution and political subjection was still fresh.

The chief problem thus seemed to be how to hold down punitive justice and protect the individual from oppression rather than how to make the criminal law an effective agency for securing democratically determined social interests already limited substantially by a bill of rights. Ignored entirely was the possibility of the growth of a phenomenon such as organized crime. Indeed, a specialized law enforcement response to the challenge of organized crime—putting aside Federal action in specialized areas—is best dated from the 1935 special rackets investigation conducted in New York County by Thomas E. Dewey at the direction of Gov. Herbert H. Lehman. It ultimately resulted in the development of the "rackets bureau concept" which underlies such State and Federal activity today.

II. FEDERAL EFFORT

Mr. President, the President's Crime Commission aptly summed up the history of law enforcement's efforts to deal with organized crime in these tragic words:

> Investigation and prosecution of organized criminal groups in the 20th century has seldom proceeded on a continuous, institutionalized basis. Public interest and demands for action have reached high levels sporadically; but, until recently, spurts of concentrated law enforcement activity have been followed by decreasing interest and application of resources.

And what has been true generally is only a little less true on the Federal level.

Federal attention was, of course, focused on organized crime during the prohibition era. The 18th amendment went into effect on January 16, 1920. And the Volstead Act that implemented the amendment passed over Wilson's surprise veto. But the Congress never appropriated more than token enforcement resources. In 1920, prohibition agents numbered only 1,520, and as late as 1930 they numbered only 2,836.

Assuming the job could have been done under any circumstances, it is clear that prohibition was doomed to failure on this score alone.

The matter may be put graphically: If the whole army of agents in 1929 had been mustered along the coast and borders to prevent rum running, there would have been one man to patrol every 12 miles of beach, harbor, headland, forest and river front. Federal enforcement, in short, consisted chiefly of uttering resounding platitudes on the virtues of law observance. Indeed, its chief prosecutive success, the conviction of Al Capone, was for tax evasion, instead of rum running, and with repeal, the Federal Government turned away from organized crime almost altogether.

At the close of World War II, however, the Federal Bureau of Investigation turned its attention to organized crime with the inauguration of a formal crime survey program in March 1944, which led to an all-out investigation of the remnants of the old Capone gang. It was during this investigation, too, that the then Attorney General, Tom C. Clark, sought and obtained the authority of President Harry S. Truman to use wiretapping in domestic cases, saying that he felt their use was "imperative." The result was a series of major cases embracing a million-dollar extortion plot in the moving picture industry, one of which included Paul DeLucia, Capone's successor and then a member of the Commission.

Neverthless, the beginning of national attention and action is best dated from the 1950 Attorney General's Conference on Organized Crime, which was called by Attorney General J. Howard McGrath at the urging of the U.S. Conference of Mayors, the American Municipal Association, National Institute of Municipal Law Officers, and the National Association of Attorneys General.

Law enforcement officials from all over the Nation met in Washington on February 15, 1950, to consider the growing scope of organized crime, particularly interstate gambling. The consensus then seemed to be that things were getting out of hand. It was all "too big." The "assistance" of the Federal Government was needed. Some people, of course, as now, dissented. A prosecutor from a large midwestern city said that he had "never received any evidence" of the "syndicate." There was no "organized gambling" in his city. It was really not such "a bad place." But Chicago's Otto Kerner did not represent the majority view, and the conference made a series of important recommendations, perhaps the most important of which was that pending legislation, authorizing an investigation into organized crime by a Senate Select Committee under the chairmanship of Senator Estes Kefauver, of Tennessee, be supported.

It was thus only a short time later that the Senate special committee began its hearings. Over 800 witnesses, from nearly every State and all major metropolitan areas, were heard and the concern of many such communities was aroused. Chicago, incidentally, was found to be the center of a national race-wire service. Chicago, too, was not found to be free of gambling. On the South Side, it was found that policy wheels grossed in excess of $150 million over the 5-year period just before the hearings.

The work of the committee covered all aspects of organized crime—gambling, narcotics, infiltration into business, political and law-enforcement corruption. For the first time, too, it focused nationwide attention on the Mafia, which it found to be the "cement" that held together the national structure of organized crime. But if the facts were dramatically brought out by the Senate hearings, little permanent value, in terms of legislation or executive action, was accomplished. Few of the committee's important legislative or executive reorganizations were adopted. The Department of Justice did establish in 1954, the Organized Crime and Racketeering Section, but it was then woefully understaffed. Indeed, by 1957, when the infamous Apalachin conference occurred it had but 10 attorneys.

Mr. President, at this point I pause to note that any evaluation of the Federal effort to date must, of course, employ those statistics that are available, although I fully recognize that it is not always possible to quantify law enforcement efforts. I ask, therefore, for unanimous consent that the basic data in the form of tables on the Federal effort, which exists only since about 1960 in meaningful form, appear in the Record following my remarks, as exhibit 2.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. McCLELLAN. Mr. President, on November 14, 1957, State and Federal investigators—quite by accident—discovered at the home of Joseph Barbara in upstate New York a gathering of at least 75 leaders of organized crime from every section of the Nation. They, too, were there, they said, "quite by accident" to visit a "sick friend."

As a result of this discovery, a number of Federal and State investigations were launched, and Attorney General William Rodgers appointed a Special Group on Organized Crime in the Department of Justice in April of 1958. Regional offices were established, intelligence on all of the attendees was collected, and extensive grand jury investigations were conducted. Twenty of the participants were indicted for obstruction of justice and convicted at trial, but their convictions were reversed on appeal for lack of evidence. The work of the Special Group was then transferred into the existing Organized Crime and Racketeering Section.

It was during this time, too, that the Senate Select Committee on Improper Activities in the Labor and Management Field under my chairmanship conducted its investigations. Over 1,525 witnesses were heard in 270 days of hearings, comprising a staggering 46,150 pages of testimony. Our chief focus, consistent with our mandate, was on corruption in the field of labor-management officers, but we found ourselves ineluctably drawn into the area of organized crime. Of the 75 or so racket leaders who met at Apalachin, N.Y., in 1957, we found, for example, that at least nine were in the coin-operated machine industry, 12 were in the garment industry, 10 owned grocery stores, 17 owned bars or restaurants, 11 were in the olive oil and cheese business, and nine were in the construction business. Others were involved in automobile agencies, coal companies, entertainment, funeral homes, ownership of horses and race tracks, linen and laundry enterprises, trucking, waterfront activities, and bakeries. As I noted in more detail earlier, organized crime had indeed moved into legitimate business and labor activity.

The Federal effort against organized crime, however, received its greatest emphasis when the late Robert P. Kennedy, who had been our chief counsel, became Attorney General in 1961. A comprehensive legislative program, combining the best of earlier recommendations, was submitted to the Congress and enacted. The work of the Organized Crime and Racketeering Section was expanded and it personnel increased. In addition, th Permanent Subcommittee on Investiga tions of the Senate Committee on Gov ernment Operations, of which I am agai the chairman, in close cooperation wit the Department of Justice and police de partments throughout the United State conducted a detailed study of the inn working of organized crime, exposing f the first time the "family" structure

La Cosa Nostra, which I discussed in greater detail earlier. Our study also confirmed that gambling remained the main source of racketeer income—supplemented chiefly by illicit profits from narcotics, labor racketeering, extortion, loan sharking and the infiltration of business and labor.

Nevertheless, like the others before it, this new drive by the Department of Justice on organized crime was fated to have a short life. When Bob Kennedy left the Department of Justice, the organized crime program seemed to leave with him; it just seemed to fall apart. The number of man-days in the field decreased from 1964 to 1967 by 84 percent. The number of man-days before grand juries decreased from 1963 to 1968 by 70 percent. The number of man-days in courts decreased from 1964 to 1967 by 56 percent. Internal Revenue Service, Intelligence Division, participation in the organized crime drive—a key participation which at its height yielded a majority of the program's prosecutions—fell from 1963 to 1968 by 56 percent. No one actually dismantled it after Attorney General Kennedy left, but then no one took the trouble at that time to rebuild it either.

The most disturbing aspect of this decline is that, although it has been partially reversed—man-days in the field and in court are up from their low in 1966—with the creation and implementation of the "strike force" concept, an imaginative staff innovation now in operation in a number of major cities, it will be years before it can be repaired and still more years before its cumulative effects are dissipated. For an effective organized crime investigation and prosecution takes years to build. This means, of course, that the decline after 1963 will just begin to be felt in the immediate years ahead.

Recent action of the Supreme Court, moreover, promises to further contribute to the decline in the Federal organized crime drive. In *Marchetti* v. *United States*, 390 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62, the court overruled two of its own decisions, *United States* v. *Kahriger*, 345 U.S. 22 (1952) and *Lewis* v. *United States*, 348 U.S. 419 (1953), which had previously sustained the constitutionality of the wagering tax laws. These two new decisions will result in the loss of 1,616 pending prosecutions, and unless Congress takes action to amend the laws, a question which must be considered in our coming hearings, it will result in the destruction of a law enforcement program that paid for itself, for since 1952 the wagering tax laws have yielded $117,406,000, but cost only $27,021,000 to administer.

On July 23, 1965, President Johnson called together his National Crime Commission and asked it to tell him, among other things, why organized crime continued to grow despite the Nation's best efforts to arrest and reverse its development. The Commission identified a number of factors—lack of resources, lack of coordination, lack of public and political commitment, failure to use available criminal sanctions. But the major legal problem related to matters of proof.

The Commission concluded:

> From a legal standpoint, organized crime—continues to grow because of defects in the evidence gathering process.

The Commission reviewed the difficulties experienced in developing evidence in this area in these terms:

> Usually, when a crime is committed, the public calls the police, but the police have to ferret out even the existence of organized crime. The many Americans who are complaint "victims" have no incentive to report the illicit operations. The millions of people who gamble illegally are the true victims of organized crime, such as those succumbing to extortion, are too afraid to inform law enforcement officials. Some misguided citizens think there is a social stigma in the role of "informer," and this tends to prevent reporting and cooperating with police.
>
> Law enforcement may be able to develop informants, but organized crime uses torture and murder to destroy the particular prosecution at hand and to deter others from cooperating with police agencies. Informants who do furnish intelligence to the police often wish to remain anonymous and are unwilling to testify publicly. Other informants are valuable on a long-range basis and cannot be used in public trials. Even when a prosecution witness testifies against family members, the criminal organization often tries, sometimes successfully, to bribe or threaten jury members or judges.
>
> Documentary evidence is equally difficult to obtain. Bookmakers at the street level keep no detailed records. Main offices of gambling enterprises can be moved often enough to keep anyone from getting sufficient evidence for a search warrant for a particular location. Mechanical devices are used that prevent even the telephone company from knowing about telephone calls. And even if an enforcement agent has a search warrant, there are easy ways to destroy written material while the agent fulfills the legal requirements of knocking on the door, announcing his identity and purpose, and waiting a reasonable time for a response before breaking into the room.

The Commission then concluded that under present procedures too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor. The Commission observed:

> Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups.

XII. THE ORGANIZED CRIME CONTROL ACT OF 1969

Mr. President, it was in light of the President's Crime Commission and our own staff studies in this area that I introduced on January 15, 1969, S. 30, the Organized Crime Control Act of 1969, which was cosponsored by Senators ERVIN and HRUSKA. I should now like to discuss its provisions and their legal background.

At the outset, let me repeat what I said when S. 30 was introduced. I am not irrevocably committed to the present language or its specific provisions, but I am hopeful that its overall objectives can meet with general support. The Subcommittee on Criminal Laws and Procedures of the Judiciary Committee will begin hearings on S. 30 and related legislation on March 18, 19, 25 and 26, 1969. We have asked the Attorney General and a number of other knowledgeable and interested parties to testify. Hopefully, the bill can be strengthened and improved by the hearing and committee process. That is the goal toward which we will be working.

THE GRAND JURY

The grand jury originated in Anglo-American law with the summoning of a group of townspeople before a public official to answer questions under oath, a system of inquiry, having its origins in late Roman procedure, used for such administrative purposes in Norman law as the compilation of the Domesday Book of William the Conqueror. In 1164, the Crown first established the criminal grand jury, a body of 12 knights, whose function was to accuse those who according to public knowledge had committed crimes. Witnesses as such were not heard before this body. Two years later at the Assize of Clarendon, Henry II established the grand jury largely in the form in which it is known today.

During the 13th and the early part of the 14th centuries, the grand jurors themselves served as petit jurors in the same matters in which they presented indictments. Not until the eventual separation of the grand jury and petit jury did the function of accusation become clearly defined and did crown witnesses come to be examined in secret before the grand jury.

The original function of the grand jury was to give to the central government the benefit of local knowledge in the apprehension of those who violated the King's peace. Its value as a buffer between citizen and state, the function which first comes into mind today, did not fully mature until well into the 17th century. In 1681 in *Colledge's* case (1681) 8 How. St. Tr. 550, and the *Earl of Shaftesburry's* case (1681) 8 How. St. Tr. 749, the grand juries which first heard the evidence of the Royal prosecutor refused to indict. These cases are usually marked as thus establishing the institution of the grand jury as a bulwark against despotism. Two years later the propriety of the grand jury report was also indirectly litigated. A Chester grand jury without returning a formal indictment charged certain Whigs with seditious conduct. An action for libel was brought and the court unanimously found for the defendants, apparently thus sustaining the actions of the jurors.

The modern grand jury is a "prototype" of its ancient British counterpart. Aptly termed a "grand inquest" by the Supreme Court in *Blair* v. *United States*, 250 U.S. 273, 282 (1919), its inquisitorial powers are virtually without rival today. Despite early attempts in this country to limit the scope of its investigatory powers to that which was brought to its attention by prosecutor or court, its common law powers have survived largely without artificial limitations. Such a limitation is not found in Federal law, where the grand jury is empowered under *Hale* v. *Henkel*, 201 U.S. 43 (1905), to inquire into and return indictments for all crimes committed within its jurisdiction. Indeed, the grand jury has usually been held open to citizen complaints. Secrecy, however, rightly governs its hearings. Grand jury reports, often a catalyst for reform, may also be filed under the laws of some States, but not under Federal law, where this historic right has been restricted.

Ultimately, the power of the grand jury rests on the subpena. Only through it can witnesses be compelled to appear and the production of books and records be required. Under Federal law, subpenas issue only out of court, and today the grand jury is generally thought of as an "arm of the court." This means that the jury is subject to the supervisory power of the court. The court impanels it, charges it, chooses its foreman, protects against abuses of its authority, and ultimately discharges it. Usually the life of the grand jury parallels the term of the court, although present Federal law allows the court to impanel a grand jury whenever it is appropriate. The grand jury's term extends until discharge, but not longer than 18 months, and the number of juries is left up to the discretion of the court. A Federal court may also discharge a grand jury at any time "for any reason or for no reason," *In re Investigation of World Arraignments*, 102 F. Supp. 628, 629 (D.D.C. 1952), even though the jury has not finished the business before it.

The conclusion seems inescapable: As an instrument of discovery against organized crime, the grand jury has no counterpart. Despite its broad powers of inquiry, however, the grand jury needs to be strengthened. The President's Crime Commission reached this judgment:

> If a grand jury shows the court that its business is unfinished at the end of a normal term, the court should extend that term a reasonable time in order to allow the grand jury to complete pending investigations. Judicial dismissal of grand juries with unfinished business should be appealable by the prosecutor and provisions made for suspension of such dismissal orders during the appeal.
>
> The automatic convening of these grand juries would force less than diligent investigators and prosecutors to explain their inaction. The grand jury should also have recourse when not satisfied with such explanations.
>
> When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community.

Modeled on present New York law, title I of S. 30 seeks each of these objectives. Briefly, this title would authorize a grand jury to be called into session in each jurisdiction once every 18 months with the right, at 6-month intervals, to extend its existence up to 36 months, on a showing to the court that it had unfinished business. These juries would be selected without discrimination from residents within their jurisdictions, and the foreman would be selected by these juries. The jury would not be limited by the charge of the court but would have the right to pursue any violation of the criminal law within its jurisdiction. Citizens would be accorded the right to contact the jury, through the foreman, regarding any alleged criminal act. In the event the workload of the jury became excessive, it could petition the court to impanel another jury, and the failure of the court to act would be appealable. The jury would also be accorded the statutory right to ask the attorney general to replace local prosecutors and investigators if dissatisfied with their performance. And, finally, the jury would be authorized to submit formal reports or presentments to the court, but safeguards are included to assure that the reports do not unfairly reflect on innocent persons.

THE DUTY TO TESTIFY AND SELF INCRIMINATION

A grand jury subpena can compel the attendance of a witness and the production of books and records. Ultimately, however, the grand jury has no power as such to compel the witness to testify or to turn over the books and records. Securing the witness' testimony and having the books and records turned over involve the interaction of the witness' duty to testify and his privilege against self incrimination.

Not until the 16th century did the modern witness become a common figure in civil or criminal trials. Up until that time jurors were supposed to find the facts based on their own self-acquired knowledge. Indeed, the pure witness—the individual who merely happens to have relevant information and who is unrelated to either party—at this time ran the substantial risk of a suit for maintenance if he volunteered to testify. This situation became, of course, wholly intolerable as litigation became more complex and juries became less and less able to resolve factual disputes on their own. Finally in *Stat. of Elizabeth* in 1563, St., 1563, 5 Eliz 1, c. 912, provision was made for compulsory process for witnesses in civil cases. With the enactment of this statute, the risk of a suit for maintenance diminished, for what a man does by compulsion of law cannot be called maintenance.

The Statutes of Elizabeth only made it possible to testify freely; it imposed no duty to testify. Nevertheless, the step from right to duty was short, and it was soon taken. By 1612, Sir Francis Bacon in the Countess of Shrewsbury's Trial, (1612) 2 How. St. Tr. 769, 778, was able to assert confidently:

> You must know that all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and land, but of their knowledge and discovery. If there be anything that imports the King's service they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.

For more than three centuries it thus has been a maximum of indubitable certainty, as the Supreme Court noted in *Piedmonte v. United States*, 367 U.S. 556, 559 n. 2 (1961), that the "public has a right to everyman's evidence."

> When the cause of justice requires the investigation of the truth—

As Dean Wigmore put it—

> no man has knowledge that is rightly private.

Nonetheless, the duty to testify, which history and society of necessity have imposed on each of us, is not absolute; it is qualified by the privilege against self-incrimination.

The history of the privilege against self-incrimination is the complicated story of the hated practice of the oath ex officio mero, an abuse first of heresy trials in the ecclesiastical courts, and then of the infamous Star Chamber, which took its rules of procedure from ecclesiastical law, and of the emotional reaction which accompanied its abolition, and ultimately stopped incriminating interrogation in the common law courts. Until the early 17th century, when the long battle between King and Parliament began, no serious and successful objection had been made to the oath ex officio. Under proper circumstances, the canon law upheld it. Through the influence of Lord Coke, however, a change occurred. By 1615, the power of the ecclesiastical court to use the oath ex officio in any penal inquiry had been ended by decisions of the common law courts. The Star Chamber and its similar practice were the next to go. As a direct result of public indignation at the Lilburn Trial (1637), 3 How. St. Tr. 1315, where the defendant was ordered pilloried and whipped for a failure to respond to the oath, Parliament abolished both the oath and the Chamber itself.

Before the Star Chamber, Lilburn himself had not claimed a privilege against self-incrimination, but merely that the proper presentment had not been made, a presentment necessary before the oath could be lawfully administered. After his cause had triumphed, however, the distinction was soon lost or ignored. The oath itself had come to be associated with the Stuart tyranny. Details were forgotten. Repeatedly claimed, then assumed for argument, finally by the end of the reign of Charles II, there was no longer any doubt of its general application. No one at any time in any English court could be compelled to accuse himself. It was out of this history and the experience of the colonists with the Royal Governors that the privilege ultimately found its way into our Bill of Rights in the fifth amendment.

The modern privilege against self-incrimination applies to any question the answer to which would furnish a link in a chain of evidence, which would incriminate the witness; it need not be answered unless, as the Supreme Court put it in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), "he chooses to speak in the unfettered exercise of his own will." Only testimonial utterances fall within its scope. The privilege is personal; it may not be claimed to protect another. In addition, it protects only natural persons; corporations or unions may not claim its protection. The privilege may be waived by the recitation of incriminating facts; the law requires its waiver when an accused testifies in his own behalf at a criminal trial. Generally, it must be asserted to be claimed, or otherwise it is waived. For the privilege is, as Dean Wigmore put it, "merely an option of refusal not a prohibition of inquiry."

Nevertheless, like the duty to testify, the privilege against self-incrimination is not an absolute. Should a witness refuse to testify before a grand jury asserting his privilege, the inquiry need not be ended. Under proper conditions, it is possible to displace the privilege with a grant of immunity, thus removing the witness' privilege not to answer. It becomes necessary, therefore, to turn to a consideration of the immunity grant and the process whereby it may be enforced.

THE IMMUNITY GRANT

In England, it was only a comparatively short time after the privilege against self-incrimination had matured before various techniques to mitigate its impact on the administration of justice developed. The first reliable example occurred in 1725, in the Trial of Lord Chancellor Macclesfield (1725) 16 How. St. Tr. 767, 931, 1147. The Chancellor had been guilty of traffic in public offices. An act was passed to immunize the present Masters in Chancery so that their testimony could be compelled. Once the present "criminality" legally attaching to their actions was effectively "taken away" by the statute, their privilege against self-incrimination "ceased" to exist. What Parliament found it could thus do with its amnesty powers, the King's prosecutors soon learned they could accomplish by the tendering of Royal pardons. The tradition in English law of permitting the privilege to be thus set aside stands even today unquestioned.

The American colonists not only brought with them the privilege against self-incrimination, but they also adopted these various techniques. As early as 1807 in the treason trial of Aaron Burr, President Jefferson attempted to give an executive pardon to one of the witnesses against Burr. The witness refused the pardon, but testified anyway. The right of a witness to refuse a pardon, and thus defeat the technique, was not clearly established until 1915, when the Supreme Court upheld the right of a grand jury witness to turn down an executive pardon from President Wilson. In the intervening years, the cloud which existed over the pardon technique because of the Burr trial directed the chief attention of the law toward the legislatively authorized immunity grant.

Congress first adopted a compulsory immunity statute in 1857. Legally, no attack was successfully mounted upon it. Nevertheless, its operation was hardly successful, since it automatically protected against prosecution any matter about which any witness testified before Congress. One individual, who had stolen $2 million in bonds from the Interior Department, had himself called before Congress, where he testified to a matter relating to the bonds and was immunized. This was an obviously intolerable situation and the statute was soon repealed. In its place the immunity statute of 1862 was enacted. The new statute did not grant immunity from prosecution; it merely purported to protect the witness from having his testimony subsequently used against him. Six years later the statute was broadened to cover judicial proceedings. After being upheld by lower Federal courts, relying on an early New York decision, the statutory scheme finally reached the Supreme Court in 1892 in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The Court refused to uphold the immunity statute, noting that the statute to be upheld would have to afford a protection coextensive with the privilege. The Court found the protection inadequate because it did not eliminate criminality, but merely protected the witness from the use of the compelled testimony. The Court observed:

> It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him.

Congress responded to the Counselmen decision with the Immunity Act of 1893. This time the statute granted immunity from prosecution, not merely from use of the testimony. Once again the validity of the immunity device was presented to the Supreme Court. In *Brown v. Walker*, 161 U.S. 591 (1896), the Court, by a closely divided vote, sustained its basic constitutionality. The Court held that once the criminality attaching by law to the actions of the witness was removed by another law, the privilege ceased to operate. The dissenters suggested that the privilege was intended to accord to the witness an absolute right of silence designed to protect not only from criminality but also disgrace or infamy, something no legislative immunity could eliminate. The majority, relying on English history, rejected this proposition. Since Brown against Walker, the basic principle of the immunity grant has not been successfully challenged, and congressional enactments extending the principle, for example, to internal security and narcotics investigations has been sustained.

Today, however, Federal statutes grant immunity in only a limited number of classes of cases. Usually the witness must claim his privilege, be directed to testify, and then testify before he receives immunity. Normally, the immunity will extend to all matters substantially related to any matter revealed in a responsive answer. Nevertheless, some Federal statutes grant immunity automatically on testimony without a claim of privilege. The danger here of accidentally granting an individual an "immunity bath" is substantial. Other Federal statutes require specific approval of the Attorney General and a court order before the immunity attaches.

Requiring approval of the court serves to make visible the decision of the Attorney General. The danger of hidden immunization of friends is lessened. No Attorney General would dare run the political risk of openly flaunting his responsibility. Where it might be attempted, it could be expected that the court would have inherent power to refuse to be a party to it. It seems readily evident that these three safeguards—claim, authorization, approval—ought to be part of every immunity statute.

Under Federal law, the case-by-case limitation on the power to grant immunity has, however, constituted a major impediment to the effective investigation of organized crime. This led the President's Crime Commission to recommend the enactment of a general immunity statute in these terms:

> A general witness immunity statute should be enacted at (the) Federal level, providing immunity sufficiently broad to assure compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State, and local immunity grants should be made to prevent interference with existing investigations.

Up until the recent decisions of the Supreme Court in *Malloy v. Hogan*, 378 U.S. 52 (1964) the proper scope of a constitutionally valid immunity statute seemed to be immunity from not only use of testimony, but also prosecution for the crimes disclosed. This approach is apparently no longer required.

Prior to Malloy against Hogan, the privilege was thought to protect only against incrimination under the laws of the questioning sovereign. Now, however, the Federal privilege protects against both State and Federal incrimination. The Malloy decision could have spelled the end of valid State immunity statutes. Under the necessary and proper and supremacy clauses of the Constitution, the power of Congress to immunize against State incrimination has been upheld. No such power, however, is possible for State authorities. Nevertheless, the Supreme Court indicated in Murphy that State immunity statutes were still valid. The Court found that the constitutional privilege was adequately displaced if the witness was protected against direct or derivative use of his compelled testimony. Contrary to the Counselmen decision, the Court seemed to feel that this was possible through the use of the fruit of the poisonous tree process of derivative suppression, an analogy borrowed from fourth amendment illegally obtained evidence cases. If the underlying premise of Counselmen—that there is no way to protect the witness from the derivative use of his compelled testimony—has indeed been rejected, it seems clear that granting immunity from prosecution rather than use of testimony is no longer constitutionally compelled on any level, State or Federal. Giving immunity where it is not necessary is giving an unnecessary gratuity to a crime, a step no sane society ought ever to take. It thus now seems clear that it is not necessary to immunize against State prosecution to give a valid grant of Federal immunity. It might well have been thought at least potentially necessary prior to Malloy against Hogan, when it seemed only a matter of time until the privilege would be extended to cover State and Federal law. Now that we know, under Murphy, that it is not, comity between State and Federal authorities would seem to indicate that any new statute granting immunity be so circumscribed.

Following this approach, title II of S. 30 is a general immunity statute conditioned on approval by the Attorney General and specific court order. Immunity, however, is only provided against use of testimony, not prosecution, and there is no interference with the power of the States to prosecute.

RECALCITRANT WITNESSES

Ultimately, of course, none of these techniques is a panacea. When a witness' privilege against self-incrimination cannot be claimed, it does not necessarily follow that he will cooperate fully in the investigation. The stage, however, is set for moving the investigation forward through the use of the contempt power.

The contempt power has roots which run deep in Anglo-American legal history. The early English courts acted for the King. Contempt of court was contempt of King. By the 14th century, the principles upon which punishment was inflicted to secure obedience to the commands of King and court were firmly established. Indeed, as the principles developed, justice was both swift and severe. In 1631, for example, a convicted felon threw a brickbat at a Chief Justice; his right hand was cut off, and he was hanged immediately in the presence of the court. No one took lightly then the respect due to a court.

Under modern law, there is no question that courts have power to enforce compliance with their lawful orders. Federal laws expressly confirm this ancient power. When subpenaed before a grand jury, the witness must attend. The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions. Two courses are open when a witness thus refuses to testify after a proper court order: Civil or criminal contempt.

Under civil contempt, the refusal is brought to the attention of the court, and the witness may be confined until he testifies; he is said to carry, as the Court noted in *In Re Nevill*, 117 Fed. 449, 461 (8th Cir. 1902), "the keys of the prison in his own pocket." Usually, where the contempt is clear, no bail is allowed when an appeal is taken. The confinement cannot extend beyond the life of the grand jury, although the sentence can be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.

Under criminal contempt, after a hearing, the witness may be imprisoned, not to compel compliance with, but to vindicate the court's order. Federal law requires a jury trial if the sentence to be imposed will exceed 6 months. No other limit is set.

Title III of S. 30 seeks to codify the civil contempt aspect of present law as it applies to grand jury and court proceedings in the area of the refusal to give required testimony. Upon such a refusal, the court is explicitly authorized to order the summary confinement of the witness, and it is provided that no bail shall be given to the witness pending the appeal, since this would undermine the coercive effect of the court's order and result in undue delay.

FALSE STATEMENTS

A subpena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self-incrimination. The threat of imprisonment for civil contempt can legitimately coerce him into testifying. But only the possibility of a perjury prosecution, or some related sanction, can provide any guarantee that his testimony will be truthful.

Today, however, the possibility of perjury prosecution is not likely, and if it materializes, the likelihood of a conviction is not high. Using the available Federal figures, we see that only 32.7 percent of the defendants in perjury cases were found guilty in the 10-year period from 1956 through 1965. In all other criminal cases, however, 78.7 percent of the defendants were found guilty. The difference is striking. Indeed, out of 307,227 defendants only 713 were even charged with perjury during this period. The threat of a perjury conviction today thus offers little hope as a guarantee of truthfulness in the evidence gathering process in organized crime investigations. Indeed, it seems apparent that virtually every organized crime investigation and prosecution is characterized by false testimony. Whatever the situation elsewhere in the administration of justice, here false testimony begins in the field with interviews, extends into the grand jury, and ultimately infects the trial itself. Convictions for perjury based on this false testimony, nevertheless, are the exception instead of the rule. It is, moreover, a failure directly attributable to the law itself. Consequently, it can be relatively easily remedied.

For centuries perjury was not the false testimony of a witness, but the false verdict of a jury. It was the incidental result of the process of attaint, whose main object was to set aside such verdicts. The process was so objectionable that it was little used. During the 14th century, however, witnesses began to be used in trials, and the function of the jury shifted from returning verdicts based on their own information to finding facts based on testimony presented to them. This change gave rise to the need for a sanction when false evidence was presented to the jury. A large gap was left in the law.

The first statutory reference to the crime of perjury appeared in 1540. The Star Chamber read this act as authorizing punishment for perjury. Although the crime was theoretically cognizable in the ordinary criminal courts, it was dealt with almost exclusive in the Star Chamber, where the proceedings were presided over by the Lord Chancellor and conducted according to the ecclesiastical law under which a quantitative notion obtained of the credit to be accorded to the testimony of a witness under oath. From this notion, the so-called two witness rule developed; that is, two witnesses to the same fact are necessary to establish it. Lord Chief Justice Hardwicke in *Rex v. Nunez*, Cas. T. Hard 265, 95 Eng. Rep. 171 (K.B. 1736), summed up the rule:

> One man's oath is as good as another's.

When the Star Chamber was abolished in 1641, the principles it had established in perjury prosecutions were carried over into the common law.

Federal courts today still follow the two witness rule and its corollary, the direct evidence rule. Actually, the two witness rule is misnamed. Under modern law, it no longer requires the testimony of two witnesses; it merely provides that the uncorroborated oath of one witness is not enough to establish the falsity of the—testimony of the—accused, *Hammer v. United States*, 271 U.S. 620, 626 (1926). The corroborating evidence, moreover, need not independently establish the falsity of the testimony; it is enough if it furnishes a basis to overcome the oath of the accused and his presumption of innocence. The rule has no application to elements of perjury other than falsity.

Closely related to the direct evidence rule are the cases holding that contradictory statements under oath may not be the subject matter of a perjury prosecution without the additional proof of the falsity of one of the statements. Dissatisfaction with this result led to the adoption of remedial statutes in some States. At the Federal level, however, the rule today remains viable.

It seems clear that the two witness and direct evidence rules ought to be abolished, at least in some areas. This was the conclusion of the President's Crime Commission. Suggestions that the existing rules are necessary "to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions," *Weller v. United States*, 323 U.S. 606, 609 (1945), are unconvincing. Note first that the adopted remedy is broader than the alleged abuse. The existing rules apply across the board. They are not limited to situations where it might be reasonably supposed retaliation was involved. Further, it is obvious that the remedy is hardly adequate even as adopted. It can easily be circumvented merely by acquiring a spiteful accomplice. Thus, it is a bad rule even if you grant the possibility of the evil. The law, moreover, ought to encourage not testimony, but truthful testimony. The existing rules run counter to this goal; perjury, not truth, is protected. More importantly, the rules constitute an unwarranted slander on the power of discernment of prosecutors, grand juries, trial judges and the petit jury. The rules seem to assume that somehow the spiteful prosecution can be brought and a conviction obtained without the support of anyone other than the complainant.

The existing rules are, in short, an unwarranted obstacle to securing legitimate perjury convictions. There is ample protection against spiteful retaliation in the traditional safeguards applicable to every criminal case. There is no good reason why perjury—at least before grand juries and courts—should not be treated like any other crime. Sound prosecutive discretion and proof beyond a reasonable doubt of a judge and jury constitute ample protection against the unwarranted charge and conviction of perjury.

On the Federal level, a statute dealing with contradictory oaths should also be adopted. There is much merit in the observation that consistency alone should not be a legislative goal. There is, however, a legitimate goal in allowing the prosecution to plead and prove its case in the alternative, showing the falsity by inherent logical inconsistency. Those who give false testimony ought not to be able to escape by placing the prosecution in a logic dilemma. It should be sufficient for conviction if the evidence shows either statement is false without specifying the false statement. There is no good reason why such proof should not be sufficient.

Title IV of S. 30 thus creates a new Federal crime dealing with false statements before grand juries or in trial proceedings, and since it is a new offense, the common law rules of evidence applicable in perjury prosecutions generally will not be applicable to it. It also eliminates the applicability to the new offense of the contradictory oath rule by establishing a special presumption of falsity where two materially inconsistent statements are made.

WITNESS FACILITIES

Each step in the evidence gathering process I have so far described moves toward the production of live testimony, for to bring criminal sanctions into play, it is necessary to develop legally admissible evidence. Criminal sanctions do not enforce themselves. Yet it must now be obvious to all concerned that witnesses in organized crime cases simply do not volunteer to testify or to turn over relevant books and records. Attorney General Nicholas deB. Katzenbach testified in 1965 that, even after the cases had been developed, it was necessary to forego prosecution hundreds of times because key witnesses would not testify for fear of being murdered. Indeed, the Attorney General indicated that such fear was not unjustified; he testified that the Department lost more than 25 informants in the period of time between 1961 and 1965.

In this connection the President's Crime Commission, tragically concluded:

> No jurisdiction has made adequate provision for protecting witnesses in organized crime cases from reprisal. In a few instances where guards are provided, resources require their withdrawal shortly after the particular trial terminates. On a case-to-case basis, governments have helped witnesses find jobs in other sections of the country or have even helped them to emigrate. The difficulty of obtaining witnesses because of the fear of reprisal could be countered somewhat if governments had established systems for protecting cooperative witnesses.
>
> The Federal Government should establish residential facilities for the protection of witnesses desiring such assistance during the pendency of organized crime litigation.
>
> After trial, the witness should be permitted to remain at the facility so long as he needs to be protected.

It was to meet this responsibility that titles V and VI of S. 30 were drafted.

Title VI authorizes the Attorney General to rent, purchase or construct such facilities as are necessary to provide secure housing for Government witnesses in organized crime investigations and prosecutions on the State or Federal level. This provision should not only help meet our responsibilities to citizens, but also aid States in meeting their responsibilities, since providing protection is such an expensive proposition.

Title V, on the other hand, authorizes the taking of pretrial depositions. I thus now turn to a consideration of the legal background of depositions in criminal cases.

DEPOSITIONS

With the development of the witness in the common law trial in the 1600's, there developed a series of rules, each seeking to establish the truth of his testimony. The witness must, as Chief Justice Vaughn put it in *Bushel's Trial* (1670) 6 How. St. Tr. 999, 1003, speak to "what hath fallen under his senses." The law then rightly wanted no part of second-hand information. Closely allied to this principle was the rule that demanded confrontation—cross examination. Too many knew of the injustice done in *Raleigh's Trial* (1603), 2 How. St. Tr. 16, when Chief Justice Popham refused to produce Lord Cobham, the accuser. No precise date or ruling stands out as decisive, but the rule seems to have become fixed between 1675 and 1690.

This rule against hearsay, however, was not without exceptions. Sworn depositions could be used, as Raleigh himself conceded, "where the accuser is not to be had conveniently" (1603) 2 How. St. Tr. 16, 18. Nevertheless, with firm establishment of the exclusion of extra judicial unsworn statement, the anomaly of the sworn statement stood out, and in *Fenwick's Trial* (1696), 13 How. St. Tr. 537, 618, the principle if not the rule carried the day, for it soon became "a fundamental rule (of) law that no evidence shall be given against a man, but in the presence of the prisoner, because he may cross-examine him who gives such evidence."

Today, of course, this rule is embodied in our sixth amendment, which guarantees "the accused the right to be confronted with the witnesses against him." Unfortunately, however, an early Virginia case confused the historic right of confrontation with a demand that all testimony in criminal cases be face to face, viva voce. This led to a constitutional doubt that showed itself in the general omission in State deposition statutes of permission to the prosecution to take depositions, subject to confrontation cross-examination, in criminal cases, even though the courts themselves, including the Supreme Court in *Mattox v. United States*, 156 U.S. 237 (1895), made it clear that on principle such provisions were unobjectionable.

Title V of S. 30 is thus but a natural complement of title VI. Title VI authorizes the physical protection of witnesses before, during, and after trial. Title V authorizes the prosecution to take depositions in criminal cases whenever it is in the interest of justice. Accordingly, once the witness' testimony has been secured, in most cases, the motive to harm the witness is at an end. The evidentiary damage has been done. Under these circumstances, it may be, therefore, possible to release the witness from protective custody and allow him to return to a normal life, even though the trial has not yet begun. Given the delay associated with criminal prosecutions today, this will be no small benefit to the witness and his family.

Title V scrupulously provides for the defendant's rights. The deposition can only be taken after the issues between the Government and the accused are joined by the return of an indictment or the filing of an information. Reasonable notice must be given to the accused, and he must be accorded the opportunity, with counsel, to confront and cross-examine the witness. Finally, provision is made in the present form of the statute for use of the deposition at trial subject to the present rules of evidence.

COCONSPIRATOR DECLARATION

In the area of the investigation and prosecution of organized crime, the existence and scope of covert conspiratorial activity is usually shown either by circumstantial evidence, the testimony of a coconspirator who has turned state's evidence, or the evidence of the out of court declarations or acts of a coconspirator or of the defendant himself. Termed "firmly established" by the Supreme Court in *Krulewitch v. United States*, 336 U.S. 440, 443 (1949), the coconspirator declaration rule, an exception to the usual exclusion of extrajudicial statements, is thus central in any attack on the menace of organized crime.

While the hearsay rule developed in the last half of the 1600's, it was but a short period of time following that this exception developed in the law. The first reliable instance occurred in the *Trial of Lord Gordon*, (1781) 21 How. St. Tr. 485, where the cries of the mob in the infamous Gordon Riots of 1780 were admitted against the defendants. Building on this decision as a precedent, English courts in the treason trials of the fellow travelers of the French Revolution soon matured the rule if not its rationale in England, while it was accepted in 1827 into American jurisprudence and rested on agency principles by no less of an authority than Mr. Justice Story in *United States v. Gooding*, 25 U.S. (12 Wheat) 460 (1827).

Today the rule is usually framed in these terms: Any declaration by one coconspirator, voiced in furtherance of the conspiracy and during its pendency, is admissible against each coconspirator, subject to the laying of an independent foundation of the existence of the conspiracy and the accused's participation in it.

Title VII of S. 30 is a codification in all but one respect of the existing law. The rule presently requires the court to find, not only participation and pendency, but also "furtherance," a requirement of somewhat ill-defined meaning, apparently an outgrowth of the early agency rationale. Sometimes, too, "furtherance" has been stated in res gestae language. Other courts, however, while ostensibly retaining the requirement have applied it so broadly that anything relating to the conspiracy is found to be in furtherance of its objectives.

Building on the recommendations of the Model Code of Evidence, Title VII shifts the foundation on which the coconspirator declaration exception to the hearsay rule rests from agency to trustworthiness. All aspects of the present rule are thus retained save that of "furtherance." With Judge Learned Hand in *Van Riper v. United States*, 13 F. 2d 961, 967 (2d Cir 1926), the proposed statute would recognize frankly that such "declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime." Vicarious responsibility is but one of the risks an individual must run when he associates for the commission of a crime. Nevertheless, the risk must be defined in terms of the underlying purpose of the trial itself rather than in terms of the principles of agency. Only those vicarious admissions where there are in existence facts and circumstances from which trustworthiness may be inferred may be vicariously admitted. It may well be expected that this rule will enlarge the category of admissible evidence, but surely this cannot be objected to where the new foundation of the rule guarantees that all such evidence admitted will lead to the establishment of the truth, however hard that truth may be in the individual case. It is not too great a risk to impose on those who associate to subvert our society.

SPECIAL OFFENDER SENTENCING

Mr. President, the last aspect of S. 30 deals with the special offender sentencing.

There is no doubt that whatever view one holds about the criminal law, its importance in our society cannot be questioned. Here each places his ultimate reliance for security. Nevertheless, we must recognize, too, that the penal law contains the strongest force known to our society, a force which in the past has too often tended toward brutality. Exercised well, it accords to each security. Exercised ill, it accords to none security. How that power should be exercised is thus a question of capital importance.

Traditionally, two tendencies have manifested themselves in the penal law in reaction from the brutality of another day, perhaps best illustrated by the philosophy of Draco, who, it should be recalled, once lamented that he knew of no penalty harsher than death, for he felt the smallest crime merited it.

The first tendency, going back in modern times to Beccaria's historic 1764 essay, "On Crimes and Punishments," seeks to fit the punishment to the crime. This tendency was, of course, rooted in a desire to limit the fearful application of the death penalty, at one time the punishment for numerous, some very petty, offenses. Its overall effect has been to narrow not only the application of the death penalty, but also to eliminate long prison terms.

The second, stemming from contemporary theories of criminology, seeks to fit the punishment to the offender. This tendency, of course, is rooted in a desire to rehabilitate. Those who generally espouse this view, however, have tended to the conclusion that crime can best be dealt with only by broad changes in our society and through intensive work with juveniles. Unfortunately, this view has shown, as an American Bar Association study concluded, "little realistic concern about the organized and well-habituated criminals who incessantly exploit the community."

The penal codes of most jurisdictions, however, reflect little of either approach. Indeed, save for attempts to abolish the death penalty, little attention at all has been given to the penalty structure of most penal codes since the turn of the century. Penalties vary from one offense to the next without seeming rhyme or reason. Inconsistencies abound throughout. Other than the "sexual psychopath" laws, the only general movement discernible has been the growth of recidivist or habitual offender statutes, a growth which occurred primarily in response to the emergence of mob activities following the First World War and the prohibition era, and which was premised on the hope that severer sentences on criminals that repeat would keep them out of circulation and protect the public.

It is less than clear, however, that these laws, in their present form, have been successful in achieving their objective. Often they have been too strictly construed by the courts. Both judges and prosecutor considering them too rigid and harsh, have refused to employ them, despite their seeming mandatory character. Courts especially have resisted attempts to restrict their sentencing discretion. Often, finally, the prosecutors have merely used the laws as tools to obtain guilty pleas in return for promises to reduce the charges. Ironically, of course, this has meant in practice that laws designed to get tough with the recidivist have served only to secure him lenient treatment.

This experience has led reform-minded groups to seek other means to achieve the same goals. Apart from the recommendations of a special committee of the American Bar Association and the President's Crime Commission, the two most important proposals have come from the American Law Institute in its Model Penal Code and the Advisory Council of Judges of the National Council on Crime and Delinquency in its Model Sentencing Act. Each seeks to respond to the special offender with a special term, yet each sets out differing conditions for its position.

The Model Penal Code states three prerequisites for its extended term. First the offender must be over 21. Second, the court must conclude that the protection of the public calls for an extended term. Finally, the code, in the alternative, calls for a finding that the circumstances of the offense show that the offender has knowingly devoted himself to criminal activity as a major source of livelihood or has substantial income or resources not explained to be from a legal activity.

The Model Sentencing Act begins with the second requirement on dangerousness of the code. It then requires that a felony be committed as a part of a continuing criminal activity in concert with at least one other person.

Both proposals provide elaborate procedures for imposing these special terms.

Both the Special Committee on the American Bar Association and the President's Crime Commission reached similar conclusions in the area of the special term for dangerous offenders, although neither attempted to offer specific statutory language.

The President's Crime Commission expressed its conclusion in these words:

> Federal and State legislation should be enacted to provide for extended prison terms where the evidence, presentence report, or sentence hearing shows that a felony was committed as part of a continuing illegal business in which the convicted offender occupied a supervisory or other management position.

It also followed this recommendation with this suggestion:

> There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in an organized crime activity or group. Constitutional requirements for such an appellate procedure must first be carefully explored.

Mr. President, S. 30 was drafted with the history of the habitual offender legislation and the proposals of these distinguished bodies in mind. It is our hope now to explore the constitutionality, wisdom, and feasibility of these various suggestions in our forthcoming hearings, for our opinion on the merits of these proposals is at this time reserved.

A number of serious questions need to be considered in greater detail than they have as yet. We are concerned, for example, that these proposals meet the constitutional test of definiteness found in such cases as *Minnesota* v. *Probate Court*, 309 U.S. 270 (1940). We are concerned that the concept of the special term will withstand attack as a reasonable classification in light of such cases as *Oyler* v. *Boles*, 368 U.S. 448 (1962), and that it will not be considered an unpermissible attempt to punish status under *Robinson* v. *California*, 370 U.S. 660 (1962). We are concerned, too, that the procedure employed in the imposition of the term meets the test of due process under *Williams* v. *New York*, 337 U.S. 241 (1949) and *Specht* v. *Patterson*, 386 U.S. 605 (1967). And, finally, we are concerned that affording the prosecution the right to appeal, as the President's Crime Commission suggested, might not run afoul of the concept of double jeopardy in *Kepner* v. *United States*, 195 U.S. 100 (1904).

These are, of course, as yet unresolved questions. But I am hopeful that through a full and fair hearing process that we will be able to work out a fair and effective sentencing structure that will meet the special challenge of organized crime.

CONCLUSION

Mr. President, I do not suggest that S. 30 is the only proposal dealing with organized crime that merits consideration. Others will surely be forthcoming from my colleagues and the new administration. But S. 30 is a beginning—a good beginning.

The President's Crime Commission concluded its chapter on organized crime with these words:

> The extraordinary thing about organized crime is that America has tolerated it for so long.

I suggest, Mr. President, that the extraordinary is fast becoming tragic. It is time to move forward now.

Mr. President, I hope I am justified in the encouragement I find from various articles in the press with respect to the attitude of the present administration in relation to crime, and particularly organized crime and methods to combat it.

I read in yesterday's Evening Star an article, written by Miriam Ottenberg, entitled "Top Officials Gear Up Machinery."

Evidently, after talking with the top officials in the administration, and particularly those in the Department of Justice, Mrs. Ottenberg wrote this article.

If I understand correctly, the administration is deeply concerned with the problem, as much, no doubt, as I am. It appears from her article that the administration is anxious that appropriate legislation in the field be enacted into law.

I am encouraged, therefore, to believe that the major provisions of S. 30 will have the support of the Justice Department, although it has made no commitment to me to that effect. I believe, too, that the administration will submit within the next few weeks some additional proposed legislation that it would like to see enacted.

It shall be my purpose as chairman of the Judiciary Subcommittee on Criminal Law and Procedures to hold extensive hearings on S. 30 and such other important measures dealing with crime and criminal procedure that are introduced during this session of Congress.

I assure the administration that any measures it sponsors or any recommendations that it may make in this field will receive the committee's earnest attention and consideration. For I sincerely hope that a new day is dawning in the field of law enforcement and that there will be cooperative and concerted effort on the part of the administration and Congress to enact legislation and to take appropriate and effective action wherever necessary to combat organized crime, this great and most destructive menace from within.

It is my hope, too, that our course, and particularly the Supreme Court of the United States, will begin to think more in terms of the right of a society to be free and to be protected from the assassin, the robber, the murderer, and the rapist than the Court has accorded to society in the past by some of its recent decisions.

If all rights are possessed by the criminal and society has none and, if every time a case comes before the Supreme Court there is a searching effort made to find some technicality with which to turn an accused loose, I am then persuaded that whatever Congress may do and whatever the law-enforcement agencies or the executive branch of the Government may do, our efforts will be thwarted and the rate of crime in our country will continue to soar, just as it has during the past calendar year, when it was 17 percent higher than it was the year before.

Mr. President, our Nation, as a free society and as a civilized society, cannot long withstand such a devastating assault upon its structure. The time is here to act.

EXHIBIT 1

PRINCIPAL FAMILIES OF THE COSA NOSTRA

THE COMMISSION

Bruno, Angelo, Philadelphia, Pa.
Colombo, Joseph, New York, N.Y.
Gambino, Carlo, New York, N.Y.
Genovese, Vito (vacant), New York, N.Y.
Giancana, Samuel, Chicago, Ill.
Lucchese, Thomas (vacant), New York, N.Y.
Magaddino, Stefano, Buffalo, N.Y.
Sciacca, Paul, New York, N.Y.
Zerilli, Joseph, Detroit, Mich.

PRINCIPAL FAMILIES

Balistrieri, Frank, Milwaukee, Wis.
Cerrito, Joseph, San Jose, Calif.
Civello, Joseph, Dallas, Tex.
Civella, Nicholas, Kansas City, Mo.
Colletti, James, Pueblo, Colo.
DeCavalcante, Samuel, Newark, N.J.
Lanza, James, San Francisco, Calif.
LaRocca, Sebastian John, Pittsburgh, Pa.
Licata, Nicolo, Los Angeles, Calif.
Marcello, Carlos, New Orleans, La.
Patriarca, Raymond, Providence, R.I.
Scalish, John, Cleveland, Ohio.
Trafficante, Santo, Tampa, Fla.

EXHIBIT 2

BASIC STATISTICS, FEDERAL EFFORT, ORGANIZED CRIME AND RACKETEERING, 1960-68

CHART I.—ORGANIZED CRIME SECTION

	1960	1961	1962	1963	1964	1965	1966	1967	1968
Number of attorneys	17	37	52	60	63	56	48	54	65
Days in court	61	116	379	1,081	1,364	813	688	617	1,125
Days in field	660	2,634	5,075	6,177	6,699	4,632	3,480	6,994	6,055
Days in grand jury	100	119	694	1,353	677	685	373	419	660
Hours in legislation	NA	NA	NA	NA	1,107	1,292	1,086	1,310	1,160
Appeal briefs prepared	3	8	15	24	76	78	21	26	43
District briefs prepared	25	14	60	179	79	61	48	34	45
Appeal briefs reviewed	69	31	100	169	115	151	112	157	267
District briefs reviewed	3	17	72	160	33	14	19	26	21
Appeal participation	NA	NA	NA	NA	23	27	17	14	15

CHART II.—ORGANIZED CRIME SECTION

	1960	1961	1962	1963	1964	1965	1966	1967	1968
Cases:									
Pending start	33	30	41	100	125	263	179	219	233
Received	453	403	525	730	368	1,023	911	965	1,276
Terminated	455	392	414	665	850	1,107	871	951	1,314
Pending end	31	41	151	125	263	179	219	233	195
Matters:									
Pending start	NA	NA	NA	NA	NA	668	565	391	534
Received	NA	NA	NA	NA	1,324	1,069	943	1,087	1,086
Terminated	NA	NA	NA	NA	655	1,212	1,117	966	1,073
Pending end	NA	NA	NA	NA	668	565	391	514	487

CHART III.—ORGANIZED CRIME SECTION INDICTMENTS

	1960	1961	1962	1963	1964	1965	1966	1967	1968
Number of indictments	NA	121	350	615	696	677	1,198	1,162	1,166
Number of defendants convicted	NA	73	138	288	333	416	477	685	520

CHART IV.—RACKETEERING STATUTE INDICTMENTS¹ ORGANIZED CRIME SECTION

	1960	1961	1962	1963	1964	1965	1966	1967	1968
Indictments			7	40	58	92	73	88	173
Defendants			25	136	138	153	123	228	377
Convictions			3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Defendants convicted			14	63	61	65	166	98	153

¹ Statutes enacted September 1961 and afterward.

CHART V.—MAN-DAYS INTERNAL REVENUE SERVICE PARTICIPATION, ORGANIZED CRIME DRIVE

	Fiscal year								
	1960	1961	1962	1963	1964	1965	1966	1967	1968
Intelligence ¹	8,836	11,528	88,852	96,182	87,621	88,113	74,936	61,637	42,136
Alcohol, tobacco and firearms	NA	NA	13,075	4,089	6,533	3,280	7,080	11,030	15,060
Audit	NA	NA	27,232	38,053	35,642	34,856	24,937	18,459	18,525
Collection	NA	NA	1,884	1,390	2,732	7,089	383	352	253
Appellate	NA	NA	190	6	NA	NA	NA	NA	NA
Total	8,836	11,528	135,163	140,054	133,598	130,298	107,336	92,550	76,974

¹ Does not include supervisory time.

CHART VI.—TAX DIVISION INDICTMENTS

	1960	1961	1962	1963	1964	1965	1966	1967	1968
Nonracketeer		482	552	597	607	625	632	653	664
Racketeer convictions	NA	23	23	23	23	27	25	21	21
Cases pending end	NA	NA	NA	129	122	101	119	183	180
Ratio (percent)	NA	NA	NA	NA	NA	11	11	17	15

CHART VII.—COSA NOSTRA INDICTMENTS, JANUARY 1961 TO DECEMBER 1968 (ESTIMATED MEMBERSHIP, 5,000)

Indictments	290
Convictions	147
Acquittals	13
Dismissals	6
Reversals	0

CHART VIII.—FEDERAL RESOURCES 1967

[Approximation]

	Man-years	Amount
Treasury:		
I.R.S.	481	7,000
Bureau of Narcotics	205	3,500
Total	686	10,500
Justice:		
FBI	NA	8,600
Department	NA	1,679
U.S. attorneys	NA	1,300
	700	11,579
Post Office	12	179
SEC	10	97
Total	1,408	22,355

Mr. McCLELLAN. Mr. President, I ask unanimous consent that the Ottenberg article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

TOP OFFICIALS GEAR UP MACHINERY: NIXON AIDES AIM THREE BIG WEAPONS AT ORGANIZED CRIME

(By Miriam Ottenberg)

The Nixon administration will use three new weapons to carry out its promised war on organized crime.

President Nixon's own crime fighting program will be announced shortly, but, in the meantime, top officials in his administration are on the move:

1. Secretary of the Treasury David Kennedy said the "full resources of the Treasury Department—including each of its investigative and enforcement arms—will be used as needed in pressing the war on organized crime."

In effect, aides indicated, Kennedy plans to go further than some of his predecessors in using the Treasury's taxing authority as a crime fighting tool.

2. Atty. Gen. John N. Mitchell has started approving use of the electronic surveillance authorized by Congress which his predecessor Ramsey Clark, refused to use.

3. Asst. Atty. Gen. Will R. Wilson, in charge of the Justice Department's criminal division, intends to expand the "strike forces"—the multiagency investigative approach to organized crime—and predicts that the FBI will be "very active in the program."

Since the strike forces made up of Justice Department lawyers and senior federal investigators started moving into target cities on an experimental basis in 1967, the FBI has supplied most of the intelligence data and has investigated matters referred to it by the strike forces, but FBI agents have not joined the strike forces themselves. The new FBI role—reportedly one of close liaison with the strike forces—could be an important plus.

Beyond these moves, Nixon's crime message is expected to propose major legislation to fight crime and to disclose some innovative measures not requiring congressional action.

In drawing up his plans against organized crime, the administration has to face a criminal intelligence gap that may take years to fill.

Investigators say that when all electronic surveillance equipment was pulled out by President Johnson in June 1965, the information blackout became so complete that investigative agencies aren't sure today whether organized crime is increasing or decreasing, what types of operations are being stressed, or who's minding the organized crime store.

Investigators know federal assaults have shaken the Cosa Nostra high command, but they're not sure who has succeeded the dead, deported or imprisoned bosses.

Wiretapping and electronic eavesdropping is again possible, under congressional authority, but the authority is circumscribed, and some agencies don't see how they can use it. Nevertheless, Justice Department lawyers are determined to make the wiretap authority effective.

Another problem is a Supreme Court ruling that gambling tax laws are not enforceable because they violated the privilege against self-incrimination. Gamblers are still supposed to purchase gambling tax stamps, but they can't be prosecuted if they don't.

While officials don't like to lose the millions that came from the excise laws, the organized crime fighters regret the loss of 200 Internal Revenue Service agents who were assigned to enforce them.

The IRS agents made raids on the basis of evidence that a bookie establishment was operating without the required gambling tax stamp. Books and records seized enabled agents to compute how much excise tax the bookie should have been paying.

The seized books also provided leads to launch income tax investigations of major racketeers and heavy bettors. Some of the biggest racketeers went to jail as a result of these investigations—and so did some corrupt police and sheriffs whose protection payoffs were noted on the bookie records.

Legislation to ensure the constitutional rights of gambler-taxpayers while reinstating the gambling tax laws has been introduced and Asst. Atty. Gen. Wilson says the administration wants it.

Justice Department sources say both Nixon and Mitchell are concerned about other problem—organized crime's increasing infiltration of legitimate business.

The president, either in his first crime message or soon after it, is expected to include recommendations to cope with organized crime's efforts to "launder" its money by such infiltration.

A YOUNGER CROWD

U.S. Atty. Robert Morgenthau of the Southern District of New York, who has convicted more big-time members of organized crime than the other U.S. attorneys put together, says crime figures are going into business in two ways. Some of the old-timers are still operating in the old standbys: meat wholesaling, juke box, vending machine, garbage, linen supply and similar lines.

But the younger, sharper crowd, according to Morgenthau, is pouring millions into real estate, hotels, motels, gambling casinos and the stock market.

The White House is showing its concern about the possible attempt of a Bahamas gambling conglomerate to buy up 9.7 percent of the stock of Pan American World Airways, a $90 million venture on today's market.

Rep. Harley O. Staggers, D-W. Va., said the White House asked him to introduce a bill to prevent or delay such a sale and Sen. Norris Cotton, R-N.H., introduced legislation to give the Civil Aeronautics Board authority to rule out the purchase of an airline by another firm if it determined the sale was not in the public interest.

The conglomerate is Resorts International, formed from the old Mary Carter Paint Co. It owns or operates three plush Bahamas gambling casinos as well as hotels, land and other properties in the Caribbean.

HARTFORD THWARTED

Investigators noted two interesting sidelights of this business. First, Huntington Hartford, the wealthy developer of Nassau's Paradise Island, failed to get government permission to operate a gambling casino there. Yet the newcomer, Resorts International, made it.

Eddie Cellini, the Paradise Island casino manager, is the brother of Dino Cellini, who has been mobster Meyer Lansky's lieutenant in many of his gambling enterprises. Dino operates the Freeport casino elsewhere in the Bahamas.

The New York Stock Exchange itself is beginning to suspect that organized crime is moving heavily into the "hot stocks" business. Robert W. Haack, exchange president, says securities with a total value of about $37 million have been reported stolen or lost in each of the last two years compared with a recorded $9.1 million in 1966. Haack said the sharp increase over the past two years "could be viewed as evidence of organized crime" although it is not conclusive.

The Securities and Exchange Commission is giving "urgent" attention to any indication that a racket figure is getting into stock manipulation. When there's increased market activity, as there is today, organized crime figures move in with their large sums of money. They operate clandestinely and their names never appear on any public document.

SOURCES OF INCOME

The money for organized crime's infiltration into legitimate business comes out of a billion-dollar treasury. Here's a capsule view of how that money is being made today:

Gambling.—Estimates of the annual intake by organized crime from gambling range from $7 billion to $50 billion annually. The profit is as high as one-third of the gross revenue. Syndicate gambling is the greatest source of organized crime's fortune, and a principal target of the government's crime fighters because it makes the poor poorer while the mobsters get richer.

Narcotics.—The gross heroin trade is conservatively estimated at $350 million annually with organized crime controlling the international movement of the drug from Turkish opium fields to Corsican-run laboratories in southern France to American docks.

There is considerable indication that the Cosa Nostra high command wants organized crime to get out of the narcotics business because of the heavy mandatory penalties, but enough mavericks are still risking the trade because of the enormous profits.

Organized crime is also involved in the distribution end of the cocaine traffic but that's mostly controlled by Spanish elements.

Not mob-controlled but flourishing is the marijuana traffic, mostly from Mexico.

Increasing drug use by young people would be enough to spark law enforcement into an extra effort to reach the traffickers, but the administration is also concerned over the vast amount of street crime that can be laid at the door of narcotics. Addicts rob to get the money to buy drugs and they sometimes murder when they're hopped up.

The fight against the drug traffic is being carried on by a brand-new bureau, combining the Treasury Department's Federal Bureau of Narcotics with former Food and Drug agents of HEW's Bureau of Drug Abuse Control.

The Justice Department's Bureau of Narcotics and Dangerous Drugs, which came out of the merger, has to meld agents with different procedures, different thinking and different talents but its organized crime unit is now deeply involved in the current "strike forces."

Loan sharking.—No one is certain just how big this business is. Agents just know it is growing. Estimates range upwards from an annual take of $350 million to the billion-dollar range. Profit margins are even higher than in gambling and personal disasters are often greater.

Terrorized victims who can't meet the 5 percent per week interest rate either turn to street crime before the "enforcer" comes to collect or become fingermen for the mob. Like gambling, loan sharking is a mob method of taking over legitimate business from debtor-owners.

Labor union take-over.—Mobsters have used threats to infiltrate legitimate unions or to prevent unionizing. With going unions, their goal is to manipulate welfare and pension funds and insurance contracts.

They have moved into trucking, waterfront and construction trades. Once in, the mob plies its usual trade—loan sharking, gambling and pilferage of anything that's not nailed down. Because of the increasing infiltration of unions, Labor Department investigators are now joining the "strike forces."

White collar crime.—In addition to the theft of securities plaguing the stock exchanges, organized crime is giving increased attention to various forms of "paper" that can be forged or counterfeited.

The Secret Service reports that government bonds which used to be thrown away or left untouched in burglaries now are being passed with forged signatures.

The Postal Inspection Service is also working closely with the strike forces because of organized crime's invasion of the credit card business, the post offices and the world of merchandising.

Post Office burglaries are at a record high and postage stamps, which used to be ignored, have become a favorite target for thieves. Generally, they keep a third of the take, the fence keeps a third and organized crime's "businessmen" get stamps at reduced rates.

Cosa Nostra fences play the key role in marketing thousands of stolen and counterfeited credit cards.

What worries federal crime fighters most is organized crime's use of underworld methods in legitimate business—the unfair competition of not having to pay union wages, underselling until the legitimate businessman is driven out and then monopolistic over-pricing.

This is one area of organized crime—unlike gambling or narcotics—where the public is no willing victim.

Organized crime's tentacles are believed to be reaching further all the time, but the bosses doing the reaching are changing.

Here's how the ruling "commission" reportedly looks today:

Thomas Lucchese, commission member and boss of a New York "family" died in July 1967.

Naming a successor has been complicated by the fact that the four logical contenders have been too involved in FBI cases.

BEGINS PRISON TERM

In December 1967, John Dioguardi was sentenced to five years in a planned bankruptcy scheme. The same month, Vincent Rao received a preliminary sentence of five years for perjury, which was made final last Tuesday. James Plumeri has been indicted by a federal grand jury in connection with kickbacks made in attempting to secure a building loan. And the fourth heir apparent, Antonio (Tony Ducks) Corallo, was among those convicted in the bribery of New York's water commissioner, James L. Marcus.

Raymond Patriarca of Providence, R.I., the New England boss, went to prison Wednesday, sentenced to five years and a $10,000 fine in a racketeering case involving conspiracy to murder. No successor has taken over yet.

Carlos Marcello, the New Orleans boss, is still free on appeal bond following his August 1968, conviction on charges of assaulting a federal officer.

Sam Giancana, until recently the undisputed boss of Chicago's Cosa Nostra, spent a year in federal custody for contempt and then left the country to avoid further investigation.

Giancana's successor, Sam Battaglia, was sentenced to 15 years in prison and a $10,000 fine on a Hobbs Act extortion case uncovered by the Internal Revenue Service during an income tax investigation.

Another leader, Felix (Milwaukee Phil) Alderisio, was also convicted of extortion.

Things have gotten so out-of-kilter in Chicago that two elderly former "bosses"—Paul (The Waiter) Ricca and Anthony Accardo—reportedly have had to come out of semi-retirement to act as caretaker of the Chicago "family."

FBI SEIZES LEADER

Steve Magaddino of Buffalo, a commission member, was arrested by the FBI along with eight of his associates last November in connection with gambling operations. At the time, over $500,000 in hoodlum funds were seized. Magaddino is currently awaiting trial.

Joe Bonanno reportedly has been deposed as head of a New York "family" and there's considerable speculation that Paul Sciacca has become the boss.

According to the same speculation, Gaspare Di Gregorio, Steve Magaddino's brother-in-law, who originally succeeded Bonanno, couldn't stand the pressure, became ill and had to be replaced by Sciacca.

Joseph Colombo reportedly has survived as boss of the Cosa Nostra family long headed by the late Joseph Profaci. Colombo was said to have taken over after the insurrection led by the Gallo crowd.

And what of a successor for the man at the top?

TWO MENTIONED

Speculation leans toward either Gerardo Catena of Newark, N.J., or Thomas Eboli (Tommy Ryan) to succeed Vito Genovese, who died in prison Feb. 14. Eboli appears to be favored principally because he's several years younger than the 67-year-old Catena. Besides, informants hint that Catena doesn't want the job.

Still in business as commission members, according to some sources, are Angelo Bruno in Philadelphia, Carlo Gambino in New York and Joseph Zerilli.

Although organized crime shows no sign of declining despite the blows struck against the top leadership, there seems to be some optimism about making substantial inroads.

This optimism is found at the top, with Asst. Atty. Gen. Wilson, and all the way down to the federal agents themselves.

Said Wilson: "You can put these people on the ropes, even when a town has been corrupted. All you need is one honest job. And time, manpower, luck, the breaks and lots of work."

REALLY MEANS BUSINESS

An agent commented: "These people (the new officials) really mean business. It's in the atmosphere."

Several former prosecutors agreed on this summary: "Organized crime has always been a definable problem. Using all the techniques now at their disposal, the prosecutors can wipe it out. It's not like crime on the streets. You don't have to worry about sociological causes. You just go out and catch them and you don't have to concern yourself with rehabilitation—not with these people."

One of the men now responsible for fighting organized crime agrees, with reservations "The cases are there to be made if we have the investigators to make them, the prosecutors to prosecute and the judges to try them."

There's a certain implied agreement in this concluding sentence of the 1967 President's Commission Task Force Report on Organized Crime:

"The extraordinary thing about organized crime is that America has tolerated it for so long."

Mr. HRUSKA. Mr. President, I earlier joined with the distinguished senior Senator from Arkansas (Mr. McCLELLAN) in sponsoring the omnibus organized crime control bill and I am delighted once again to associate myself with his remarks concerning the bill and the very serious problem with which it deals. The Senator's description of the nature and scope of the organized crime menace in America today is detailed and informed. His explanation of the several provisions of the omnibus bill—and, more important, of the need for each of them—is scholarly and precise. I wish to add my commendation and wholehearted support of the Senator's objectives.

In addition, the chairman of the Criminal Laws Subcommittee and I are in agreement that the omnibus bill is just a beginning if the 91st Congress is to enact a really effective legislative program in the area of organized crime. Hopefully, other measures will be introduced here that will contribute significantly to that program. As the ranking minority member of the Criminal Laws Subcommittee, I look forward to participating in the pending hearings on the omnibus bill and on all other worthwhile organized crime measures that come before us.

In that regard, Mr. President, I announce my intention of introducing another package of organized crime bills in advance of the hearings which will contain measures similar to S. 2048 and S. 2049 of the 90th Congress. Just as I am not unalterably committed to the precise wording of any one or all of the provisions of the omnibus bill, neither am I committed to all aspects of the bills I am preparing. I have great confidence in the committee process. With all these proposals before the subcommittee, a sound program directed against organized crime will evolve.

There is one other point I would like to make. The omnibus organized crime bill contains a provision authorizing appellate review of sentences imposed under that act. I heartily approve of appellate review in this area. As the sponsor of S. [illegible], which passed the Senate in the 90th Congress, I am anxious to continue to advance this procedure until it is enacted into law. S. 1540 was, of course, much broader than section 3577 of title VIII of the omnibus bill. It applied to all defendants convicted of a felony and sentenced to 1 year or more in prison. It is my hope that section 3577 will be similarly expanded to cover all convicted felons.

Quite frankly, Mr. President, I see no reason to restrict the fundamental fairness embodied in appellate review to only those individuals convicted of participating in organized crime. For the information of the distinguished chairman of the Criminal Laws Subcommittee, I have drafted and will introduce shortly, a bill similar to S. 1540 of the 90th Congress. It is my hope that serious consideration will be given to adopting it in whole as an amendment to S. 30.

Mr. President, I want to take this occasion to express my appreciation of the firm and able leadership President Nixon and Attorney General Mitchell have demonstrated in their first weeks in office in the battle against crime in America.

The Attorney General's decision to employ electronic surveillance under court supervision is a major step forward in cracking down on the Mafia and other underworld organizations. There is no reason law enforcement officials should not use every legal means at their command to combat this evil menace.

The campaign of last fall clearly demonstrated that crime in the streets is a national problem. The tendency of the Johnson administration and its Attorney General to excuse the rising crime rate by placing the blame on poverty has been overwhelmingly rejected by the American public.

We all want to do all we can to work toward the elimination of poverty, but poverty is only one factor contributing to the alarming crime statistics. If we could somehow eliminate poverty overnight, there would still be the violent and the criminal and the depraved, preying on innocent citizens.

The best way to reduce crime is to enforce the laws, to make it less profitable and a lot more risky to break the law. In this connection, we must restore the Nation's respect, not alone for law and order, but for those public servants whom we employ for that purpose, the policeman, the sheriff, and other law enforcement agents.

The Federal Government has an important role to play in supporting the States and cities in their attack on the crime problem.

This role, Mr. President, covers a wide range from direct grants to State and local law-enforcement agencies to upgrade and improve them, to application of the tremendous technical assistance available from Federal agencies.

Along with better police protection, there must be a concomitant improvement throughout the whole area of criminal justice, improved court procedures to eliminate long delays in trials, better detention facilities, reform of bail procedures and special attention to the problems of the juvenile offender and the narcotics addict.

Again, I commend the distinguished Senator from Arkansas for his dedication and contributions to the war against organized crime.

S. 1623 AND S. 1624—INTRODUCTION OF TWO BILLS AIMED AT ORGANIZED CRIME

Mr. HRUSKA. Mr. President, in my remarks on organized crime on March 11, I indicated my intention to introduce additional bills aimed at racketeering. Today, I have two bills which I send to the desk. The first of these measures, the Criminal Activities Profits Act, seeks to strengthen the defense of legitimate business against takeover by organized crime. I ask that it be appropriately referred.

The PRESIDING OFFICER. Without objection, the bill will be received and appropriately referred.

The bill (S. 1623) to amend title 18 of the United States Code to prohibit the investment of certain income in any business enterprise affecting interstate or foreign commerce, and for other purposes, introduced by Mr. HRUSKA, was received, read twice by its title, and referred to the Committee on the Judiciary.

Mr. HRUSKA. Mr. President, the second bill, the Wagering Tax Amendments of 1969, is a wagering tax bill which reinstitutes the tax and penalties imposed on gambling revenues. I ask unanimous consent that this bill be referred to the Committee on the Judiciary and that, after the committee acts on it, it be referred to the Committee on Finance.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (S. 1624) to amend the Internal Revenue Code of 1954 to modify the provisions relating to taxes on wagering to insure the constitutional rights of taxpayers, to facilitate the collection of such taxes, and for other purposes, introduced by Mr. HRUSKA, was received, read twice by its title, and referred to the Committee on the Judiciary; thereafter to be referred to the Committee on Finance.

Mr. HRUSKA. Mr. President, for some time, the matter of racketeer infiltration of legitimate business has been of very particular and very deep concern to me. We are all familiar with the nature of this problem. I need not reiterate everything that the distinguished Senator from Arkansas (Mr. McCLELLAN), set forth last week on the subject, but I would like to focus on one very fundamental point he expressed which is quite relevant to the first bill I have proposed.

> Often the organization, using force and fear, will attempt to secure a monopoly in the service or product of a business. When the monopoly campaign is successful, the organization begins to extract a premium price from customers. Purchasing by infiltrated businesses are always made from specified allied firms. With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can be effectively eliminated and customers can be effectively confined to sponsored suppliers. The result is more unwholesome than other monopolies because the newly dominated concern's position does not rest on economic superiority.

It is tragic for the public to permit racketeers to own and operate ostensibly legitimate businesses. The notion that individuals who are purveyors in murder and mayhem are at the same time dealing in lawful products and services for law abiding citizenry is inherently offensive. All the more so then, does racketeer infiltration of the legitimate business community become offensive when the broader aspects of the phenomenon are considered.

The power of organized crime to establish a monopoly within numerous business fields is, without a doubt, a grave threat to our entire economic system. It is as grave a threat as the conventional forms of business monopolies that have occupied the attention of our antitrust laws since the turn of the century because of the methods by which the monopoly power is acquired, exercised, and perpetuated. This power, moreover, is concentrated in the hands of predators more rapacious than any legendary robber-barons at whom the antitrust laws were originally aimed.

Not only will organized crime bring to a business venture all the techniques of violence and intimidation which it used in its illegal business, but it is also a foregone conclusion that those individuals who have made a career of cheating and stealing will continue to do so in their new roles. The consumer public will suffer from inflated prices, shoddy goods, and outright frauds.

And what of the honest businessman who is forced to compete with a racketeer dominated venture? Even if he is not intimidated or physically abused he cannot compete on an even basis when we recall the racketeers' penchant for underreporting income and evading taxes. Just this element of routine tax evasion gives the hoodlum businessman an enormous economic advantage over his law-abiding competitors. In short, this entire matter of racketeer infiltration of legitimate business inevitably creates unfair competition. It is a situation made to order for the application of the Federal antitrust powers that have been in existence for many years.

With this in mind, Mr. President, I have today introduced a bill entitled "The Criminal Activities Profits Act." This bill is aimed specifically at racketeer infiltration of legitimate business and it is premised principally upon our existing antitrust laws. In the 90th Congress I sponsored two bills, S. 2048 and S. 2049, which were essentially similar to the bill I introduce today. Identical bills were sponsored in the other body by the able Congressman from Virginia, RICHARD POFF. The bill is a synthesis of both of those bills, incorporating all of their features into a unified whole. It attacks the economic power of organized crime and its exercise of unfair competition with honest businessmen on two fronts—criminal and civil.

The criminal provisions of the bill prohibit the investment, in any business which is conducted in or which affects interstate commerce, of income which either has not been reported for Federal income tax purposes or has been derived from carrying on certain specified criminal activities. These activities are the type generally associated with organized crime like gambling, loan sharking, narcotics trafficking, and so forth.

In addition to this criminal prohibition, the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap. Patterned closely after the Sherman Act, it provides for private treble damage suits, prospective injunctive relief, unlimited discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.

Last year, Mr. President, the American Bar Association examined the two earlier bills, S. 2048 and S. 2049, and endorsed the principles and objectives of both. In order to avoid what was felt to be an undesirable commingling of criminal enforcement goals with the goal of regulating competition, however, the ABA stated a preference for placing the enforcement and discovery procedures in a separate statute rather than within the existing framework of the Sherman Act, as was the case with the earlier bills. As a result of the ABA recommendation, the single new bill has been drafted as an amendment to title 18 of the United States Code with self-contained enforcement and discovery procedures.

I ask unanimous consent to have printed at the end of my remarks the report of the antitrust section of the American Bar Association on S. 2048 and S. 2049.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HRUSKA. Mr. President, in order to properly evaluate the need for this legislation, one must first put into perspective the size of the problem with which it deals. Based upon the estimates of experts, most notably the President's Crime Commission, the "take" or profit organized crime derives from its illegal activities seems to be considerably in excess of $10 billion a year. Not all of this finds its way into legitimate businesses, of course, but nevertheless the availability of such a staggering sum represents enormous danger to the American economy.

The Criminal Activities Profits Act, is a new approach to the war against organized crime. However, I am not wedded to any provisions of the bill. Standing alone, the criminal provisions may not be necessary. In fact, the criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill.

The principal utility of the Criminal Activities Profits Act may lie in the fact that it will inevitably promote the establishment of a Federal program against racketeer infiltration of legitimate business. There has never been a program, as such, aimed at the phenomenon itself. I believe such a program is needed, and I believe the provisions of this bill lay a good foundation for such an approach.

This bill provides new jurisdictional bases upon which a host of investigations may be undertaken that are not authorized under present law. For example, it is particularly difficult currently to find a basis for investigating the entire matter of cleansing racket money through numbered accounts in foreign banks. A new law such as this will be helpful, particularly because of its civil discovery procedures.

Despite the number of articles written on the subject, despite the hearings of the Special Senate Committee To Investigate Organized Crime in Interstate Commerce, despite other investigative efforts, we know very little about the infiltration of legitimate business. Both the Congress and the Department of Justice are hampered by this lack of knowledge. The Criminal Activities Profits Act can make a substantial contribution in this area.

I view the bill as a vehicle by which the Department of Justice can determine what businesses are involved, the amount of money controlled, the amount of profits earned, the amount of capital invested, the distribution of earnings, and all the other data necessary to enable the Government to assess the problem and draw plans to meet it.

Finally, I believe that the time has arrived for innovation in the organized crime fight. The bill is innovative in the sense that it vitalizes procedures which have been tried and proven in the antitrust field and applies them into the organized crime field where they have been seldom used before. Hopefully, experts on organized crime will be able to conceive of additional applications of the law. The potential is great. For these reasons, the bill is worthy of careful consideration.

The second bill that I have introduced today is entitled the "Wagering Tax Amendments of 1969." The same measure has been introduced in the other body by the distinguished Representative from Virginia, RICHARD POFF. Illegal gambling is organized crime's most lucrative source of income. Profit from this activity alone runs to $7 billion a year. A little more than a year ago the Federal antigambling program ran into a serious problem. In *Marchetti* v. *United States*, 350 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62, the Supreme Court overruled two of its own decisions, *United States* v. *Kahriager*, 345 U.S. 22 (1952) and *Lewis* v. *United States*, 348 U.S. 419 (1952), which had previously sustained the constitutionality of the wagering tax laws. As the distinguished Senator from Arkansas pointed out last week:

> These two new decisions will result in the loss of 1,616 pending prosecutions, and unless Congress takes action to amend the laws, a question which must be considered in our coming hearings, it will result in the destruction of a law enforcement program that paid for itself, for since 1952 the wagering tax laws have yielded $117,406,000, but cost only $37,031,000 to administer.

The wagering tax amendments are aimed at precisely that problem. The bill revitalizes the wagering tax laws both as law enforcement measures and as revenue-producing measures for the U.S. Treasury. First enacted in 1950 as a result of the Kefauver hearings, the wagering taxes have always been considered primarily revenue measures. At the same time they have also been highly valuable as Federal law enforcement tools in the gambling field, particularly where the numbers racket is involved.

At present there are two separate wagering taxes on the books. The first is a registration or occupation tax of $50 imposed annually on persons who accept wagers. The second is an excise tax of 10 percent imposed on gross wagers accepted. Compliance was enforced through the general criminal sanctions of the Revenue Code: Section 7201 imposing up to 5 years in prison for willful evasion of taxes; section 7203 imposing 1 year for willful failure to file return; and through a special provision, section 7262, making it a misdemeanor to fail to file returns where a duty to file existed.

The late Robert Kennedy estimated that fully 60 percent of the racketeer convictions obtained during his tenure as Attorney General resulted from investigations conducted by the Internal Revenue Service. Most of these were wagering tax violations. The effect of the Supreme Court decisions has been the sharp curtailment of the jurisdiction of the Revenue Service in the organized crime drive. The loss of this highly skilled agent manpower from that drive has been considerable.

The elimination of effective wagering tax laws has robbed the Federal Government of its own few weapons against the numbers racket. It is generally agreed that at least half of organized crime's profit from illegal gambling, about $3.5 billion a year, comes from numbers operations, which I use, incidentally, as a generic term embracing all lottery schemes irrespective of their specific form.

Almost all of this money is being taken out of the hands of those who can least afford it—the urban poor who are the principal customers and victims of numbers operations. It is an anomaly that at just the time in history when the most concern is being voiced about the plight of the urban poor, suddenly we are without the means at the Federal level to cope with one of the activities that can only increase their poverty.

When the Supreme Court rendered the Marchetti and Grosso decisions, it did not strike down the taxes themselves, but it did debilitate their enforcement. The law did not restrict the use the Federal Government or any State government could make of the information required to be filed. Because the gambler could well be in violation of State or other Federal laws, the Court found the registration requirement to be in violation of the fifth amendment right against self-incrimination. The effect of the decisions has been to bar prosecutions for failing to register and pay taxes.

The Court indicated, however, that a carefully drawn restriction on the use to which the compelled information may be put would satisfy the fifth amendment. Such a use restriction is at the heart of the bill I have introduced, and it is my belief that it meets all the requirements laid down by the Court.

If Congress does not act favorably upon this bill, the result will be that persons whose activities are illegal have immunity from taxes while those whose activities are legal do not. That is an impossible result.

The bill provides for a 10-percent excise tax on gross wagers accepted. This is similar to the present tax. In addition, it increases the annual registration tax—wagering occupational tax—from $50 to $1,000 for principals of gambling operations and those who actually accept wagers, and it creates a new $100 tax liability for certain other employees of such operations who have been exempt. The President's Crime Commission estimated that as much as $50 billion a year is wagered illegally in the United States. Assuming the accuracy of that figure, the potential in revenue recovery to the Government is in the neighborhood of $5 billion a year. It would be naive to expect that the actual revenue will be anywhere near that sum, of course, but if only a tenth were recovered in taxes, this would amount to one-half billion a year.

The wagering tax will have several results. It is almost a certainty that many gamblers will simply go out of business because the price for them will be too steep. That is all to the good. Others will continue in business but without complying with the law at all. Many of them will be prosecuted for the failure to comply. That is also to the good. Others will continue in business but will only partially comply with the law—they will cheat on their return and evade part of their taxes. From them the Government will obtain revenue and that, too, is all to the good.

The Criminal Activities Profits Act and the Wagering Tax Amendments of 1969 are two additional weapons to be added to the arsenal needed to fight organized crime. It is my hope they can be carefully considered in hearings, and that legislation can be reported to the Senate floor for favorable action.

Mr. President, I ask unanimous consent that the texts of the bills be set forth at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. HRUSKA. Mr. President, earlier this week there were hearings before the Subcommittee on Criminal Laws and Procedures, chaired by the senior Senator from Arkansas, at which the Attorney General was present, and he testified during the course of those hearings.

At that time this Senator indicated his intention to introduce those bills on today and requested of the chairman that, promptly upon reference of these bills to the committee, they would be transmitted to the Attorney General for his consideration, analysis, and comment.

It is my hope that, in due time, there will be consideration of the proposition embodied and incorporated in these bills, and that there will be incorporated these provisions, or so many parts and portions thereof as will be thought beneficial and helpful, as amendments to the bill introduced by the Senator from Arkansas on March 11, which is remarkably adapted and intended to deal with other aspects of this particular field of criminal activity.

Mr. President, I yield the floor.

EXHIBIT 1

REPORT OF ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION

REPORT ON S. 2048 AND S. 2049

S. 2048 and S. 2049 are bills designed to combat and penalize organized crime, particularly in its attempt to infiltrate and take over legitimate businesses by means of money illegally obtained.

Provisions of bills

Both bills utilize the machinery of the antitrust laws to accomplish the desired end. S. 2048 is framed as an amendment to the Sherman Act and would replace § 8 of that Act. S. 2049 is drafted as an independent piece of legislation, but includes in its provisions the discovery and enforcement procedures of the antitrust laws.

S. 2048 amends the Sherman Act to make it a violation of the antitrust laws to invest intentionally unreported income in any business enterprise.

In essence, S. 2049 makes it a criminal offense to apply the income received from enumerated criminal activities to any business enterprise.

To aid in enforcement, S. 2049 authorizes the issuance of injunctions at the request of either the government or a private party. Persons injured due to the application of income derived criminally in legitimate businesses may bring treble damage actions, and a criminal judgment would be *prima facie* evidence in any treble damage action.

S. 2049 also authorizes nationwide service of process and grants immunity from prosecution to witnesses testifying in proceedings instituted by the United States under this statute.

Need for legislation

The evidence is clear that organized crime, which takes billions of dollars—mostly in cash and mostly untaxed—annually from the American public, has broadened its operations by infiltrating and taking over legitimate businesses. The President's Commission on Law Enforcement concluded, "The cumulative effect of the infiltration of legitimate business in America cannot be measured. Law enforcement officials agree that entry into legitimate business [by organized crime] is continually increasing and that it has not decreased organized crime's control over gambling, usury and other profitable, low-risk criminal enterprises." The Challenge of Crime in a Free Society, p. 190 (1967).

Organized crime, therefore, is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority.

The magnitude of the problem makes it clear that all legitimate methods of combating organized crime must be utilized. According to the President's Commission on Law Enforcement, "law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's." The Challenge of Crime in a Free Society, p. 200 (1967).

Application of antitrust principles to organized crime

The time tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime.

Thus, in addition to making combinations and conspiracies in restraint of trade, as well as monopolizations and attempts to monopolize, illegal and punishable by criminal penalties, 15 U.S.C. §§ 1, 2, the antitrust laws provide for civil enforcement. Private parties injured by conduct violative of antitrust laws may bring actions to recover treble their losses plus their attorney's fees. 15 U.S.C. § 15.

In a private damage suit, the fact of a prior government judgment involving the same conduct may be used as *prima facie* evidence that the antitrust laws have been violated. 15 U.S.C. § 16.

Witnesses testifying before a grand jury about antitrust violations are given immunity from prosecution for offenses discussed in his testimony. 15 U.S.C. § 32.

The antitrust laws also provide for discovery of facts by means of the grand jury process in a criminal investigation and by means of a civil investigative demand by the Justice Department in civil actions. 15 U.S.C. § 1312.

Some of the conduct of organized crime in legitimate businesses can be, and has been, reached by the existing antitrust laws. Thus, for example, in *United States* v. *Bitz*, 282 F. 2d 465 (2d Cir. 1960), the Court of Appeals sustained an indictment under § 1 of the Sherman Act. In this case, the antitrust laws were used to combat activities of racketeers who were engaged in an unlawful combination and conspiracy in restraint of trade in the wholesale distribution and sale of newspapers and magazines in the metropolitan New York area. The conspiracy operated by means of strikes and strike threats to coerce distributors to pay the conspirators sums of money. Those who refused had their shipments of newspapers and magazines interfered with. Convictions were subsequently obtained and the defendants sentenced to jail terms. See also, e.g. *United States* v. *Pennsylvania Refuse Removal Association*, 357 F. 2d 806 (3d Cir.), *cert. denied*, 384 U.S. 961 (1966) (Criminal convictions of conspiracy to restrain trade in refuse removal by means of the coercion of non-conspirators affirmed); *Los Angeles Meat and Provision Drivers Union* v. *United States*, 371 U.S. 94 (1962) (Antitrust laws used in a civil proceeding to attack and enjoin a conspiracy in the sale of yellow grease which was enforced in a coercive manner).

Other activities of organized crime in legitimate business may or may not be subject to the antitrust laws. Thus, some extortion tactics and business take-overs by organized crime might not be reached under the antitrust laws, particularly if they affected only the victimized business rather than resulted in a lessening of competition in an entire line of commerce.

Still other activities of organized crime in connection with legitimate businesses are clearly not subject to the existing antitrust laws. These include such techniques as the loan of money on condition that a racketeer be appointed to the recipient's board of directors, or an investment of concealed profits acquired from illegal activity.

As described above, S. 2048 and S. 2049 extend the use of the antitrust machinery as a weapon against organized crime.

The Antitrust Section agrees that organized crime must be stopped. It further agrees that the antitrust machinery possesses certain advantages worthy of utilizaiton in this fight. It therefore supports and endorses the principles and objectives of both S. 2048 and S. 2049, and similar legislation.

However, it prefers the approach of S. 2049. By placing the antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.

S. 2048, on the other hand, by inserting in the Sherman Act a provision which does not have as its primary objective the establishment or maintenance of free competition, may result in an undesirable blending of otherwise laudatory statutory objectives. Criminal conduct which violates existing antitrust laws can be proceeded against under those laws. Additional conduct sought to be reached should be attacked under separate legislation.

Moreover, the use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."

Conversely, the placing of this legislation in the body of the antitrust laws could have an undesirable and inappropriate impact on the administration of the antitrust laws in their normal context. Thus, faced with litigation between private citizens and members of the organized criminal hierarchy, there may well be a natural inclination to weight the balance heavily in favor of the private citizen. Such an imbalance, while defensible in this context, is inappropriate in the normal antitrust litigation context.

For the foregoing reasons, the Section of Antitrust Law recommends that the House of Delegates adopt the attached resolution endorsing the principles and objectives of S. 2048 and S. 2049, and all similar legislation having the purposes of adapting the machinery of the antitrust laws to the prosecution of organized crime, but recommending that any such legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law.

EXHIBIT 2

S. 1623

A bill to amend title 18 of the United States Code to prohibit the investment of certain income in any business enterprise affecting interstate or foreign commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Activities Profits Act".

DEFINITIONS

SEC. 2. As used in this Act—

(1) The term "criminal activity" means (A) any act involving murder, kidnaping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States; (B) any act which is punishable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 891–894 (relating to extortionate credit transactions), sections 471, 472, and 473 (relating to counterfeiting), section 1084 (relating to the transmission of gambling information), section 1503 (relating to obstruction of justice), section 1952 (relating to racketeering), section 1954 (relating to welfare fund bribery), and chapter 117 (relating to white slave traffic); and (C) any conspiracy to commit any of the foregoing offenses.

(2) The term "interstate commerce" means commerce within the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or between any place in a State and any place in another State, or between places in the same State through another State.

(3) The term "foreign commerce" means commerce between any State and any foreign country.

(4) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(5) The term "person" means any individual, and any partnership, corporation, association, or other legal entity.

(6) The term "income" means any income which is required by the Internal Revenue Code of 1954 to be reported as such for purposes of income taxation.

(7) The term "intentionally unreported income" means any income of any person which is subject to income taxation under the provisions of the Internal Revenue Code of 1954, but which with intent to evade the requirements of such code is not reported by such person as income within the time prescribed by such code.

PROHIBITION

SEC. 3. (a) Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, applies any part of such income or the proceeds of any such income to the acquisition by or on behalf of such person of legal title to or any beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce shall be guilty of a felony and shall be fined not more than $10,000, or imprisoned not more than 10 years, or both.

(b) Whoever, being a director, officer, or agent of a corporation who has authorized, ordered, or performed any act which constitutes in whole or in part a violation of subsection (a) by such corporation, shall be guilty of misdemeanor and shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(c) Whoever (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than 10,000, or imprisoned for not more than ten years or both.

INJUNCTIONS

Sec. 3. (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 2.

(b) Under the direction of the Attorney General, it shall be the duty of United States attorneys, in their respective districts, to institute proceedings to prevent and restrain such violations. In any action by the United States under this section, the court shall proceed as soon as may be to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such temporary restraining order or prohibition as it shall deem proper.

(c) Any person (other than the United States) may institute action under this section, in any district court of the United States having jurisdiction over the parties, to prevent and restrain threatened loss or damage to such person from a violation of section 2. In any such action, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any such action before a determination thereof upon its merits.

ACTIONS FOR DAMAGES

Sec. 4. (a) Any person who is injured in his business or property by reason of any violation of section 2 may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

(b) Whenever the United States is injured in its business or property by reason of any violation of section 2, it may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual amount of the damages sustained, and the cost of the action.

(c) Except as otherwise provided by section 5, any action under this section shall be barred unless it is commenced within four years after the cause of action accrued.

EFFECT OF JUDGMENTS

Sec. 5. (a) A final judgment or decree entered in any civil or criminal proceeding instituted by the United States under this Act to the effect that a defendant has violated section 2 of this Act shall be prima facie evidence against such defendant, in any action brought by any other party against such defendant under this Act, as to all matters with respect to which such judgment or decree would be an estoppel as between the parties thereto. This subsection shall not apply to any consent judgment or decree entered before any testimony has been taken, or to any judgment or decree entered in an action under section 4(b).

(b) Whenever any civil or criminal action (other than an action under section 4(b)) is instituted by the United States to prevent, restrain, or punish any violation of section 2, the running of the period of limitations prescribed by section 4(c) with respect to any private right of action arising under this Act which is based in whole or in part on any matter complained of in such action by the United States shall be suspended during the pendency of such action by the United States and for one year thereafter. Whenever the running of such period of limitations is so suspended with respect to any right of action arising under section 4(a), action thereon shall be barred unless it is commenced within such period of suspension or within four years after the accrual of the cause of action.

VENUE AND PROCESS

Sec. 6. (a) Except as otherwise specifically provided by this Act, any civil or criminal action or proceeding under this Act against any person may be instituted in the district court of the United States for any district in which such person resides, is found, or has an agent, and any such action or proceeding against a corporation also may be instituted in such court for any district in which such corporation transacts business.

(b) In any action under section 3(b) of this Act in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this Act in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) Except as otherwise specifically provided by this Act, all process in any action or proceeding under this Act against a corporation may be served in any judicial district in which such corporation is an inhabitant or is found.

EXPEDITION OF ACTIONS

Sec. 7. In any civil action instituted by the United States in any district court of the United States under this Act, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge (or in his absence to the presiding circuit judge) of the circuit in which such action is pending. Upon receipt of such copy, such judge shall designate immediately three judges of that circuit (of whom at least one shall be a circuit judge) to hear and determine such action. The judges so designated shall assign such action for hearing at the earliest practicable date, participate in the hearing and determination thereof, and cause such action to be expedited in every way.

EVIDENCE

Sec. 8. (a) In the taking of depositions for use in any civil action instituted by the United States under this Act, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court, and no order excluding the public from attendance at any such proceeding shall be made or enforced.

(b) No individual who gives testimony under oath, or produces documentary evidence under oath, in obedience to a subpena issued in any action or proceeding instituted by the United States under this Act may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies, or produces documentary or other evidence, in such action, except that no such individual shall be exempt from prosecution or punishment for perjury committed while so testifying.

APPEALS

Sec. 9. In every civil action instituted by the United States in any district court of the United States under this Act, an appeal from the final judgment of the district court will lie only to the Supreme Court.

S. 1624

A bill to amend the Internal Revenue Code of 1954 to modify the provisions relating to taxes on wagering to insure the constitutional rights of taxpayers, to facilitate the collection of such taxes, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Wagering Tax Amendments of 1969."

(b) AMENDMENT OF 1954 CODE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a provision of the Internal Revenue Code of 1954.

(c) EFFECTIVE DATE.—The amendments made by this Act shall apply after the date of the enactment of this Act.

SEC. 2. MODIFICATIONS TO INSURE CONSTITUTIONAL RIGHTS AND FACILITATE COLLECTION.

(a) AMENDMENT OF CHAPTER 35.—Chapter 35 (relating to taxes on wagering) is amended to read as follows:

"SUBCHAPTER A—TAX ON WAGERS

"Sec. 4401. Imposition of tax.
"Sec. 4402. Cross references.

"SEC. 4401. IMPOSITION OF TAX.

"(a) WAGERS.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

"(b) AMOUNT OF WAGER.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

"(c) PERSONS LIABLE FOR TAX.—The following persons shall be liable for the excise tax imposed by this subchapter:

"(1) PRINCIPALS AND PUNCHBOARD OPERATORS.—Each person who is a principal or a punchboard operator, as defined in section 4421, shall be liable for and shall pay the tax under this subchapter on all wagers placed with him or in a pool or lottery conducted by him.

"(2) AGENTS.—Each person who is an agent, as defined in section 4421, and who fails to register under section 4412 shall be liable for and shall pay the tax imposed by this subchapter on all such wagers received by him.

"SEC. 4402. CROSS REFERENCES.

"For penalties and other administrative provisions applicable to this subchapter, see sections 4421 to 4424, inclusive, and subtitle F.

"SUBCHAPTER B—OCCUPATIONAL TAX

"Sec. 4411. Imposition of tax.
"Sec. 4412. Registration.
"Sec. 4413. Certain provisions made applicable.
"Sec. 4414. Cross references.

"Sec. 4411. Imposition of Tax.

"(a) Persons Liable for Tax.—There is hereby imposed—

"(1) Principals and Agents.—A special tax of $1,000 per year to be paid by each person who is a principal or an agent.

"(2) Pickup Men, Employees, and Punchboard Operators.—A special tax of $100 per year to be paid by each person who is a pickup man, an employee, or a punchboard operator.

"(b) Rate of Tax.—Whenever a person is liable for the special tax under more than one of the rates applicable under subsection (a), such person shall be liable for only one such tax payable at the highest applicable rate.

"Sec. 4412. Registration.

"(a) Registration Requirements.—Each principal, agent, pickup man, employee, and punchboard operator shall register with the official in charge of the internal revenue district in which such person is principally engaged in the activity which makes him liable for tax under this chapter. The form of the registration and the information to be provided by such person shall be prescribed by the Secretary or his delegate in such regulations as may be necessary to carry out the purposes of this chapter.

"(b) Firm or Company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) Supplemental Information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needed for the enforcement of this chapter.

"Sec. 4413. Certain Provisions Made Applicable.

"Sections 4901, 4902, 4904, 4905, and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provision of sections 4901 to 4907, inclusive, shall so extend or apply.

"Sec. 4414. Cross References.

"For penalties and other administrative provisions applicable to this subchapter, see sections 4421 to 4424, inclusive; and subtitle F.

"Subchapter C—Miscellaneous Provisions

"Sec. 4421. Definitions.
"Sec. 4422. Applicability of Federal State laws.
"Sec. 4423. Disclosure of wagering tax information.
"Sec. 4424. Territorial extent.

"Sec. 4421. Definitions.

"(a) Wager.—For purposes of this chapter—

"(1) In General.—The term 'wager' means—

"(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

"(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

"(C) any wager placed in a lottery conducted for profit.

"(2) Exceptions.—The term 'wager' does not include—

"(A) any wager placed with, or any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

"(B) any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 4461, or any amount paid in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2), if an occupational tax is imposed with respect to such device by section 4461, or

"(C) any wager placed in a sweepstakes, wagering pool, or lottery—

"(i) which is conducted by an agency of a State acting under authority of State law, and

"(ii) the ultimate winners in which are determined by the results of a horserace, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

"(b) Lottery.—For purposes of this chapter—

"(1) In General.—The term 'lottery' means the numbers game, policy, and similar types of wagering.

"(2) Exceptions.—The term 'lottery' does not include—

"(A) any game of a type in which usually—

"(i) the wagers are placed,

"(ii) the winners are determined, and

"(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game; and

"(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

"(c) Principal.—For purposes of this chapter, the term 'principal' means any person (other than a punchboard operator) who is engaged in the business of accepting wagers or who conducts any wagering pool or lottery.

"(d) Agent.—For purposes of this chapter, the term 'agent' means any person who is engaged in receiving wagers for or on behalf of a principal.

"(e) Pickup Man.—For purposes of this chapter, the term 'pickup man' means any person who knowingly is engaged in transmitting in any manner wagers, or information, records, or payments relating to wagers, between any principal, agent, pickup man, employee, or combination thereof.

"(f) Employee.—For purposes of this chapter, the term 'employee' means any person (other than an agent or pickup man) who knowingly is employed to assist in any capacity in an activity which makes another person liable for special tax as a principal, agent, or pickup man.

"(g) Punchboard Operator.—The term 'punchboard operator' means any person who accepts wagers only in the form of chances on a punchboard, 'five card draw game,' or similar gaming device for profit, either on his own behalf or on behalf of another person.

"Sec. 4422. Applicability of Federal and State Laws.

"The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

"Sec. 4423. Disclosure of Wagering Tax Information.

"(a) General Rule.—Except as otherwise provided in this section, neither the Secretary nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person—

"(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

"(2) any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

"(3) any information derived, directly or indirectly, from any such return, payment, registration, or record.

"(b) Permissible Disclosure.—A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be—

"(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

"(2) used, directly or indirectly, in any criminal prosecution for any offense occurring prior to the effective date of this Act.

"(c) Use of Documents Possessed by Taxpayer.—Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title—

"(1) any stamp denoting payment of the special tax under this chapter,

"(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

"(3) any information derived, directly or indirectly, from any such document,

shall not be admitted as evidence or used for any purpose against such taxpayer in any action, suit, or other judicial or administrative proceeding.

"(d) Inspection by Committees of Congress.—Section 6103(d) shall apply with respect to any return, payment, or registration made pursuant to this chapter.

"Sec. 4424. Territorial Extent.

"The taxes imposed by this chapter shall apply only to wagers accepted in the United States, or wagers placed by a person who is in the United States—

"(a) with a person who is a citizen or resident of the United States, or

"(b) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States."

(b) Repeal of Public Disclosure Requirement.—Section 6107 (relating to list of special taxpayers for public inspection) is hereby repealed.

(c) Repeal of Posting Requirement.—Section 6806 (relating to posting occupational tax stamps) is amended to read as follows:

"Sec. 6806. Posting Occupational Tax Stamp.

"Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax (other than the tax imposed under subchapter B of chapter 35 or under subchapter B of chapter 36), shall place and keep conspicuously in his establishment or place of business all stamps denoting payment of such special tax."

(d) Clerical Amendments.—

(1) The table of sections for subchapter B of chapter 61 (relating to miscellaneous provisions) is amended by striking out:

"Sec. 6107. List of special taxpayers for public inspection."

(2) Section 6110 (relating to cross references) is amended by adding at the end thereof the following new paragraph:

"(6) For prohibition on disclosure of wagering tax information, see section 4423."

Sec. 3. Criminal Penalties.

(a) Unauthorized Disclosure by Government Officials.—Section 7213 (relating to unauthorized disclosure of information) is amended—

(1) by redesignating subsection (e) as subsection (f); and

(2) by adding after subsection (d) the following new subsection:

"(e) Wagering Tax Returns.—Any officer or employee of the United States who violates section 4423 shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution; and the offender shall be dismissed from office or discharged from employment."

(b) ELIMINATION OF MANDATORY MINIMUM FINE.—Section 7262 (relating to violation of occupational tax laws relating to wagering—failure to pay special tax) is amended by striking out "be fined not less than $1,000 and not more than $5,000" and inserting in lieu thereof "be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 months, or both, together with costs of prosecution."

(c) FAILURE TO POST TAX STAMPS.—Section 7273 (relating to penalties for offenses relating to special taxes) is amended to read as follows:

"SEC. 7273. PENALTIES FOR OFFENSES RELATING TO SPECIAL TAXES.

"Any person who shall fail to place and keep stamps denoting the payment of the special tax as provided in section 6806 shall be liable to a penalty (not less than $10) equal to the special tax for which his business rendered him liable, unless such failure is shown to be due to reasonable cause. If such failure to comply with section 6806 is through willful neglect or refusal, then the penalty shall be double the amount above prescribed."

(d) CLERICAL AMENDMENTS.—

(1) Section 5692 (relating to penalties relating to posting of special tax) is amended by striking out "section 7273(a)" and inserting in lieu thereof "section 7273."

(2) Section 7609(a) (relating to inspection of books, papers, records, and other data) is amended by striking out paragraph (5) and redesignating paragraph (6) as paragraph (5).

SEC. 4. IMMUNITY FOR WITNESSES IN TAX MATTERS.

(a) GRANTS OF IMMUNITY.—Chapter 75 (relating to crimes, other offenses, and forfeitures) is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER E—IMMUNITY

"SEC. 7351. IMMUNITY FOR WITNESSES.

"(a) GENERAL RULE.—Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any case or proceeding before any grand jury or court of the United States relating to the administration or civil or criminal enforcement of any tax imposed by chapter 35 of this title, is necessary to the public interest, the United States Attorney, upon the approval of the Attorney General or an Assistant Attorney General designated by the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a criminal penalty or forfeiture. But no such witness shall be prosecuted or subjected to any criminal penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled nor evidence so produced be used as evidence in any criminal proceeding (except prosecutions described in subsection (b)) against him in any court.

"(b) EXCEPTIONS.—No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

(b) CLERICAL AMENDMENT.—The table of subchapters for chapter 75 (relating to crimes, other offenses, and forfeitures) is amended by adding at the end thereof the following:

"Subchapter E. Immunity."

S. 1861—INTRODUCTION OF THE CORRUPT ORGANIZATIONS ACT OF 1969

Mr. McCLELLAN. Mr. President, on January 15, 1969, along with two of my distinguished colleagues, the Senator from North Carolina (Mr. ERVIN) and the Senator from Nebraska (Mr. HRUSKA), I introduced S. 30, the Organized Crime Control Act of 1969, which will strengthen the procedural aspects of Federal law enforcement efforts to stamp out organized crime in the United States.

The bill which I am introducing today, the Corrupt Organizations Act of 1969, is in part a product of testimony developed in 4 days of hearings on S. 30.

There is a rising awareness, in official circles and among all our people, of the depth of penetration of organized crime into the fabric of our society.

Paul J. Curran, chairman, New York State Commission of Investigation, testified before the subcommittee:

> In our investigations, the Commission has found that the means used by racketeers to penetrate and to gain control of legitimate business, or simply to engage in extortion, ranged from old fashioned muscle and violence to such more sophisticated techniques as using a big underworld name as a salesman, or merely mentioning such a name as being connected with a particular company, or "borrowing" money with no intention of even repaying the "loan." Of course, many other techniques were and are utilized.

Organized crime business penetration, moreover, is not, as some would believe, a process by which the racketeers will eventually be legitimized. Criminals use racketeering methods in legitimate fields of endeavor. They corrupt others, instead of becoming legitimized. The only way in which this cancer can be removed from our economy is by direct attack, by forceable removal and prevention of return.

Mr. President, the time has come for such a frontal assault to be made on the bastions of organized crime. Our present laws are inadequate to remove criminals from legitimate-endeavor organizations. Constant references have been made to the frustration resulting when the only consequence of a conviction is that organized crime and its infiltrated organizations are run by a new leader, and the organizations which are the real threat are not affected. Attorney General John A. Mitchell has called for new ideas in this area, and I have been in contact with him in the preparation of this legislation. The distinguished Senator from Nebraska (Mr. Hruska) has introduced legislation which would apply certain approaches from other areas of Government activity, such as taxation and antitrust, to the problem of organized crime. He also joins me in the introduction of this bill. Congressman Poff of Virginia has also been in contact with me in reference to this bill. It is, Mr. President, bipartisan legislation.

The problem, simply stated, is that organized crime is increasingly taking over organizations in our country, presenting an intolerable increase in deterioration of our Nation's standards. Efforts to dislodge them so far have been of little avail. To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill which I am introducing today, a bill entitled the "Corrupt Organizations Act of 1969." This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President's Crime Commission.

The bill uses the most direct route to accomplish this result. If an organization is acquired or run by the proscribed racketeering method, then the persons involved are removed from the organization. This legislation—possibly for the first time—develops the use of other techniques and approaches as a means to remove organized crime influences from legitimate organizations.

The bill draws heavily upon the remedies developed in the field of antitrust. Nevertheless, Mr. President, I believe it necessary to make several clarifying remarks on the antitrust remedies this bill provides. The first is that the equitable remedies used in the field of antitrust always existed. Because the remedies have been effective in removing and preventing harmful behavior in the business segment of our economy, they show great promise as tools for attacking organized crime. There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.

The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill. Nor do I mean to limit the remedies available to those which have already been established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill.

My second point is that this bill in its particular provisions is an innovating approach to the problem of organized crime. As such, it must be subjected to searching analysis in order to forge its underlying ideas into the most effective tools possible. I assume that it will be referred to the Committee on the Judiciary and then to the Subcommittee on Criminal Laws and Procedures, in which event I would expect to schedule early hearings in order to expedite processing and consideration of the bill. Its provisions might well be incorporated by way of amendment into S. 30 itself.

Mr. President, I ask unanimous consent to have the text of the bill printed in the Record at the conclusion of my remarks.

The PRESIDING OFFICER. The bill will be received and appropriately referred; and, without objection, the bill will be printed in the Record.

Mr. McCLELLAN. Mr. President, the bill creates a new chapter 95 in title 18, entitled "Racketeer Influenced Organizations," containing sections which I shall briefly highlight in order to show the response to organized crime contained in this proposed legislation.

Section 1961, definitions, in subsections (1)–(12) defines the type of activity subject to actions. These were based on the President's Crime Commission report which stated:

> Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans and (4) using various forms of extortion.

In addition, various methods of corruption used by organized crime to conduct ordinarily legitimate businesses are included.

Section 1962 sets forth the forbidden activities, which are to acquire, control or operate organizations by the use of a pattern of racketeering activity as defined in section 1961, or to acquire an organization by the collection of unlawful debt. I emphasize that this is not aimed at the isolated criminal act. I note, too, that at least one act occurring after the effective date of this legislation must be shown to make out a violation.

Section 1963 provides that any violation of section 1962 provable beyond a reasonable doubt will result in a forfeiture of the violators' interest in the organization to the United States. This is a powerful weapon, which will, I hope, effectively remove the organized crime element from a particular field of activity, as well as remove the illegal profit potential which makes certain fields so attractive today. Precedent for forfeitures, of course, runs deep in our common law heritage. It thus calls on the past to meet the problems of today.

Section 1964, civil remedies, provides for divestiture of interest and other remedies as to persons found to have violated section 1962. Ample precedent here exists in the antitrust laws, and I quote from the landmark decision *United States v. DuPont & Co.*, 366 U.S. 316, 326–27 (1961):

> The key to the whole question of antitrust remedy is, of course, the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest.
>
> If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.

One must remember that this is a court speaking of remedying an economic concentration of power, which potentially might have an adverse effect upon our economy. This bill attacks a far more heinous offense, the use of force, threats of force, enforcement of illegal debts, and corruption in the acquisition or operation of business. If DuPont and other related companies can be forced to rid themselves of General Motors ownership, almost without regard for the economic consequences, then it most surely follows that the removal of criminal elements from the organizations of our society by divestiture is justified. The situation may be said to cry for legislation to accomplish that result. The criminal surely can lose his right to own a business or other enterprise as easily as can the essentially honest, but potentially too powerful businessman.

This provision will, I trust, effectively remove the criminal figure from the particular corrupt organization. As used in connection with the remedy of prohibition of engaging in the same kind of business in the future, the criminal element is not only removed from an area of activity, he is also prohibited from using the knowhow acquired to start the same business again under a different name. Again the antitrust laws furnish ample precedent.

In *United States* v. *Grinnel Corp.*, 384 U.S. 563, 579 (1966), Judge Wyzanski, the district court judge, had decreed that one Fleming should be enjoined from working for any of the corporate defendants to an antitrust suit because of constant flouting of the antitrust laws, even though no predatory practices were found to exist. The Supreme Court, while it reversed on factual underpinning to support the legal judgment, acknowledged that the remedy itself was clearly available if appropriate facts were found:

> Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record.

I submit that if predatory conduct is the basis for such a prohibition, then surely murder, extortion and other crimes are more than equal grounds for the prohibition.

Additional authority for prohibiting persons or corporations from engaging in certain types of legitimate activities may be found in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and *Deveau* v. *Braisted*, 363 U.S. 144 (1960), as well as numerous disbarment cases.

In all of these cases, the courts have emphasized that the prohibition is not in the nature of a penalty against any individual. It is instead in the nature of protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest. In the spirit of this background, this provision is remedial rather than penal. It is based upon judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public they must be prohibited from continuing to engage in this type of business in any capacity.

In the event an organization is so corrupt that divestiture does not provide an effective remedy, then the court is authorized to require dissolution. Authority for dissolution is found in *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242 (1959). Again I emphasize that the remedies are not confined to those listed.

Estoppel specifically is provided between a criminal suit won by the United States and a civil suit, but in no other instance.

Section 1965 provides broad venue and process, similar to that set out in the antitrust laws.

Section 1966 provides for expedition of actions due to the crucial nature of the actions.

Section 1967 provides for open depositions, on the theory that publicity is one of the most effective actions we have for use against the organized criminal. An immunity section similar to that of S. 30 is also in section 1967.

Section 1968, "Investigations," is patterned after the civil investigative demand used by the Department of Justice with great effect in civil antitrust investigations. In the hearings before the Senate Antitrust and Monopoly Subcommittee concerning S. 167, which created the civil investigative demand, the Department of Justice testified that if there are both civil and criminal penalties for the same conduct, many problems occur if a civil precharge investigation is not authorized. I quote:

> As this committee knows, in many cases, the grand jury cannot be used to investigate antitrust violations. The Supreme Court held, in *United States* v. *Proctor & Gamble*, 356 U.S. 677 (1958), that is an abuse of process to use a grand jury in an antitrust investigation where there is no intention to bring a criminal case. This decision is now being used to harass the Department in situations where grand jury investigations have led to civil, rather than criminal cases. There are many reasons why the Department may not seek an indictment in these instances. The evidence uncovered may not be strong enough to meet the strict standard of proof in criminal cases. The antitrust violations uncovered may not involve such willful disregard for the law as to warrant the imposition of criminal penalties and the stigma which attaches to those penalties. Another reason for bringing only a civil suit is that the public interest may require the prompt invocation of civil remedies such as divestiture or injunction. The bringing of a criminal case will often delay this civil relief.
>
> Whatever the reason for proceeding only by civil case, the decision to so do now subjects the Department to great potential harassment. In *United States* v. *Carter Products, Inc.*, a civil case was brought in the Southern District of New York after a grand jury proceeding in which no indictment was returned. The court ordered answers to interrogatories requesting the names of all persons involved in the decision not to proceed criminally and all persons who assisted in drafting the complaint. After those names were supplied, 13 attorneys and officials of the Department of Justice, including the former Attorney General, William P. Rogers, were subpenaed to give depositions. Similar tactics are now being tried in a number of other cases.

We must avoid an occurrence of this type activity in the area covered by the instant bill.

The bill also adds interception of communications to the weapons available to the community in combating organized crime infiltration, provides that it shall be construed so as to effectuate its broad remedial purposes, and contains a separability clause.

Mr. President, in introducing S. 30, I made it quite clear that neither the omnibus crime bill of 1968, nor S. 30, would be sufficient to remedy the crime problems facing our country. Nor will this bill completely solve the problem. But all of this legislation will be helpful in stamping out the organized crime parasites preying upon our society. We need even more imaginative legislation; we need as much money as we can find to fund the fight; we need cooperation, not only between various governmental authorities, but also between citizens and law enforcement authority; and we need to inform the citizenry as to when and where they are pouring their funds into the coffers of organized crime, which funds are then used to destroy the society which produced them. Organized crime can and must be stamped out. This bill is, I hope, another useful tool which law enforcement desperately needs for its fight against organized crime. Organized crime must not be allowed to take over our country's economy, or any significant portion of it.

The bill (S. 1861) to amend title 18, United States Code, to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and for other purposes, introduced by Mr. McClellan (for himself and other Senators), was received, read twice by its title, referred to the Committee on the Judiciary, and ordered to be printed in the Record, as follows:

S. 1861

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Corrupt Organizations Act of 1969."

CONGRESSIONAL FINDINGS AND STATEMENT OF POLICY

The Congress finds (1) that organized crime in the United States is a highly sophisticated, diversified, and nation-wide illegal activity that annually drains billions of dollars from the nation's economy while operating by corruption and the illegal use of violence (2) that organized crime derives a major portion of its power through money and property obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of stolen property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) that this money and power are being increasingly used to infiltrate legitimate businesses, trade organizations, labor unions, and other associations; (4) that the danger of organized crime activities in the nation threatens the domestic peace, security and stability of its economic system, harms innocent investors and competing organizations, interferes with free competition, and seriously burdens interstate and foreign commerce; and (5) that organized crime continues to grow despite efforts to deal with it, in part because of the past inadequacy of remedies designed to deal with it.

It is, therefore, the declared policy of the Congress to eradicate the baneful influence of organized crime in the United States by the enactment of remedial legislation which will, through fine, imprisonment, criminal forfeiture, and civil divestiture, dissolution, injunction and other relief, enlarge, strengthen and vitalize the tools available to arrest and reverse the growth of organized crime in the United States, its infiltration of legitimate organizations, and its interference with interstate and foreign commerce.

Sec. 2. (a) Title 18 of the United States Code is amended by adding immediately after chapter 95 thereof the following new chapter:

"CHAPTER 96—RACKETEER INFLUENCED ORGANIZATIONS

"Sec.
"1961. Definitions.
"1962. Prohibited racketeering activities.
"1963. Criminal penalties.
"1964. Civil remedies.
"1965. Venue and process.

"1966. Expedition of actions.
"1967. Evidence.
"1968. Investigations.

"§ 1961. Definitions

"As used in this chapter—

"(1) The term 'racketeering activity' means (A) any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 664 (relating to embezzlement from pension and welfare funds), section 659 (relating to theft from interstate shipment), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling transformation), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1954 (relating to welfare fund bribery), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421–24 (relating to white slave traffic), section 501(c) of the Labor Management Reporting and Disclosure Act of 1959 (relating to embezzlement from union funds), and (C) any conspiracy to commit any of the foregoing offenses.

"(2) The term 'interstate commerce' means commerce within the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or between any place in a State and any place in another State, or between places in the same State through another State.

"(3) The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone and American Samoa.

"(4) The term 'person' includes any individual or entity capable of holding a legal or beneficial interest in property.

"(5) The term 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

"(6) The term 'pattern of racketeering activity' includes at least one act occurring after the effective date of this Chapter.

"(7) The term 'unlawful debt' means a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate.

"(8) The term 'racketeering order' means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under this Chapter.

"(9) The term 'racketeering investigation' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been engaged in any racketeering violation.

"(10) The term 'racketeering violation' means any act or omission in violation of this Chapter or any racketeering order hereunder.

"(11) The term 'racketeering investigator' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect this Chapter.

"(12) The term 'documentary material' includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

"§ 1962. Prohibited racketeering activities.

"(a) It shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(b) It shall be unlawful for any person to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, through a pattern of racketeering activity or through collection of unlawful debt.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

"§ 1963. Criminal penalties

"(a) Whoever violates any provision of section 1962 of this Chapter shall be fined not more than $10,000 or imprisoned not more than 20 years, or both, and shall forfeit to the United States all interest in the enterprise engaged in, or the activities of which affect, interstate or foreign commerce.

"(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including but not limited to, the acceptance of satisfactory performance bonds, in connection with property subject to forfeiture under this section, as it shall deem proper.

"(c) Upon conviction of a person under this section, the court shall authorize the Attorney General, or any Assistant Attorney General designated by the Attorney General, to seize all property declared forfeited under this section upon such terms and conditions as the court shall deem proper. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this Chapter by the Attorney General, or any Assistant Attorney General designated by the Attorney General.

"§ 1964. Civil remedies

"(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this Chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interests, direct or indirect, in any enterprise; prohibiting any person from engaging in the same type of business or other activity as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution of any such enterprise.

"(b) The Attorney General, or any Assistant Attorney General designated by the Attorney General, may institute proceedings to prevent and restrain such violations. In any action brought by the United States under this section the court shall proceed as soon as may be to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, as it shall deem proper.

"(c) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this Chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

"§ 1965. Venue and process

"(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

"(b) In any action under section 1964(b) of this Chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

"(c) In any civil criminal action or proceeding instituted by the United States under this Chapter in the district court of the United States for any Judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"(d) All process in any action or proceeding under this chapter may be served in any judicial district in which such person is an inhabitant or is found.

"§ 1966. Expedition of actions

"In any civil action instituted by the United States in any district court of the United States under this chapter, the Attorney General, or any Assistant Attorney General designated by the Attorney General, may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine such action. The judge so designated shall assign such action for hearing at the earliest practicable date, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

"§ 1967. Evidence

"(a) In the taking of depositions for use in any civil action instituted by the United States under this chapter, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court, and no order excluding the public from attendance at any such proceeding shall be made or enforced.

"(b) Whenever in the judgment of the Attorney General, or any Assistant Attorney General designated by the Attorney General, the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States, or in any civil proceedings under this chapter involving a violation of section 1962 of this chapter, is necessary to the public interest, the United States attorney, upon the approval of the Attorney General, or any Assistant Attorney General designated by the Attorney General, shall make application to such court that the witness shall be instructed to testify or produce evidence, subject to the provisions of this section. Upon order of the court no such witness shall, after having claimed his privilege against self-incrimination, be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may compel him to be a witness against himself in a criminal case. Such testimony or evidence so compelled or any evidence, knowledge, or information which is come at by the exploitation of such testimony or evidence so compelled shall not be used as evidence in any criminal case against such witness except a prosecution for giving false testimony or for a failure to comply with the order.

"§ 1968. Investigations

"(a) Civil investigative demand.

"(1) Issuance.

"Whenever the Attorney General, or the Assistant Attorney General designated by the Attorney General, has reason to believe that any person or enterprise under investigation may be in possession, custody, or control of any documentary material relevant to a civil racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

"(2) Contents.

"Each such demand shall—

"(i) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

"(ii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

"(iii) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(iv) identify the custodian to whom such material shall be made available.

"(3) Reasonableness; privilege.

"No such demand shall—

"(i) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

"(ii) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

"(4) Territorial limits of service.

"Any such demand may be served by any racketeering investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

"(5) Service upon legal entity.

"Service of any such demand or any petition filed under this section may be made upon a person by—

"(i) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

"(ii) deliverying a duly executed copy thereof to the principal office or place of business of the person to be served; or

"(iii) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person at its principal office or place of business.

"(6) Return.

"A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(7) Racketeering document custodian.

"(i) Designation; deputy custodians.

"The Attorney General, or any Assistant Attorney General designated by the Attorney General, shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

"(ii) Compliance with civil investigative demand; original documentary material.

"Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

"(iii) Possession of documentary material; responsibility for use and return; copies for official use; examinations.

"The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

"(iv) Delivery of documentary material for use in presentation of case or proceeding; return to custodian of material not in control of court or grand jury.

"Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

"(v) Return to producer of documentary material not in control of court or grand jury.

"Upon the completion of (1) the racketeering investigation for which any documentary material was produced under this chapter, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

"(vi) Demand by producer for return of documentary material upon failure to institute case or proceeding within reasonable time after completion of examination and analysis of evidence.

"When any documentary material has been produced by any person under this chapter for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, or the Assistant Attorney General designated by the Attorney General, to the return of all documentary material other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section so produced by such person.

"(vii) Successor custodian; notice to producer of documentary material; duties and responsibilities of successor.

"In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General, or any Assistant Attorney General designated by the Attorney General, shall promptly (1) designate another racketeering investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

"(b) Judicial proceedings.

"(1) Petition for enforcement; venue.

"Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, or any Assistant Attorney General designated by the Attorney General, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

"(2) Petition for order modifying or setting aside demand; time for petition; suspension of time allowed for compliance with demand during pendency of petition; grounds for relief.

"Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

"(3) Petition for order requiring performance by custodian of duties; venue.

"At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.

"(4) Jurisdiction; appeal; contempts.

"Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28. Any disobedience of any final order entered under this section by any court may be punished as a contempt thereof.

"(5) Applicability of Federal Rules of Civil Procedure.

"To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter."

(b) The table of contents of Part I of such title is amended by inserting after the analysis designating chapter 95 the following:

"96. Racketeer influenced and corrupt organizations. . . . 1961."

Sec. 3. (a) Section 2516(1)(C), title 18, United States Code, is amended by inserting at the end thereof between the parenthesis and the comma, the following:

"section 1963 (violations with respect to racketeer influenced and corrupt organizations)"

(b) Section 2517(3), title 18, United States Code, is amended by striking the word "criminal" therefrom.

Sec. 4. The provisions of this act shall be liberally construed so as to effectuate its remedial purposes.

Sec. 5. If the provisions of any part of this Act or any amendments made thereby or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

No. 5

91st [illegible] SENATE { Report No. 91-617

[redacted] CRIME CONTROL ACT OF 1969

REPORT

OF THE

[illegible]MMITTEE ON THE JUDICIARY UNITED STATES SENATE

TOGETHER WITH

INDIVIDUAL AND ADDITIONAL VIEWS

TO ACCOMPANY

S. 30

DECEMBER 18, (legislative [illegible] DECEMBER 16), 1969.—Ordered to be printed

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done through the testimony of agents who have surveilled the location and observed the kind of traffic in and out of it that is characteristic of a gambling operation. Nevertheless, to show at this investigatory stage that the gambling activity involves the use of interstate commerce or its facilities can be much more difficult. Under the existing statutes, however, a demonstration of this nexus is necessary. In contrast, if a Federal warrant can be obtained and a raid conducted, the Federal agents making the raid are entitled to confiscate and use as evidence documents or other things which they find on the premises. Information thus obtained will often show a sufficient relationship of the gambling enterprise to interstate commerce to bring indictments under other Federal statutes. By so supplementing existing Federal legislation by eliminating the requirement that an interstate element be proved in each case, title VIII offers a promise of conserving investigative manpower requirements and an opportunity of concluding successfully investigations that have been thwarted in the past and cases that have not been subject to prosecution in Federal courts for lack of proof of a specific interstate aspect.

NATIONAL GAMBLING COMMISSION

With the enactment of title VIII, the extension of Federal jurisdiction into the field of syndicated gambling will have reached its constitutional limit. Federal concern over the use of interstate facilities to promote gambling has a long history,[93] but Federal concern with operations of the syndicates themselves and the attendant failure of State and local law enforcement to meet the challenge of professional gambling began only with the Attorneys General Conference on Organized Crime in 1950.[94] It is clearly time, therefore, to take stock of where our Nation is and what directions it should take in the future. Title VIII thus ends with the establishment of a Commission To Review National Policy Toward Gambling. The Commission wil come into existence 2 years after the effective date of the title and make its report 4 years later. The Commission will be composed of 15 members, four from the Senate, four from the House of Representatives, and seven appointed by the President. The Chairman will be designated by the President. The Commission will be entitled to subpena witnesses and hold hearings. The Commission will have as its duty "to conduct a comprehensive study" of existing Federal, State, and local policy with respect to gambling and "to formulate and propose such changes" as it shall deem appropriate.

Title VIII of S. 30, as amended, is derived from S. 2022, which was originally introduced by Senator Hruska for himself and Senators Dirksen, Eastland, McClellan, and Mundt, on April 29, 1969.[95] Clarifying and other amendments have been made with the approval of the Department of Justice.[96] As presently drafted, title VIII has the support of the Department of Justice.

Title VIII constitutes the committee's best efforts to extend to Federal law enforcement the new substantive tools it needs to respond to the special challenge posed by syndicated gambling and its attendant corruption. Its provisions are summarized above[97] and analyzed in detail below.[98] As now drafted, the committee recommends that title VIII pass.

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[93] See, e.g., *In Re Rapier*, 143 U.S. 110 (1892), sustaining the former provisions of 18 U.S.C. § 1302, which prohibits mailing lottery tickets: *Champion v. Ames*, 188 U.S. 321 (1903), sustaining the Federal Lottery Act of 1895, 28 Stat. 963.

[94] See Hearings at 498–505.

[95] 115 Cong. Rec. S4232 (daily ed., April 29, 1969).

[96] See Hearings at 390, 412.

TITLE IX: RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Titles I through VII of S. 30, as amended, may be characterized as procedural, while title VIII is substantive. In contrast, title IX has both procedural and substantive aspects. It has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures.

SUBVERSION OF LEGITIMATE ORGANIZATIONS

There is rising awareness, in official circles and among all of our people, of the depth of penetration of the forces of organized crime into the fabric of our society and our commercial life. A special committee of the American Bar Association has concluded:[99]

> The evidence is clear that organized crime which takes billions of dollars—mostly in cash and mostly untaxed—annually from the American public, has broadened its operations by infiltrating and taking over legitimate businesses. . . . Organized crime, therefore, is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority.
>
> The magnitude of the problem makes it clear that all legitimate methods of combating organized crime must be utilized.

INFILTRATION OF LEGITIMATE BUSINESSES

In most cities, organized crime now dominates the fields of jukebox and vending machine distribution.[1] Racketeers in one midwestern city control, or have large interests in 89 businesses with total assets of more than $800 million and annual receipts in excess of $900 million. Laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded and taken over. The Special Committee to Investigate Organized Crime in Interstate Commerce, under the leadership of Senator Estes Kefauver, noted in 1951 that the following industries have been invaded: advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drugstores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, jukebox, laundry, liquor, loan, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap, shipping, steel surplus, television, theaters, and transportation.[2]

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[97] Supra at 33–34.

[98] Infra at 153.

[99] Report of Antitrust section of the American Bar Association on S. 2048 and S. 2049 (1968), reprinted in Hearings at 559.

[1] See generally S. Rept. No. 1139, Select Committee on Improper Activities in the Labor Management Field, U.S. Senate, 86th Cong., 2d sess. at 723–868 (1960).

Often it is the small or marginal businessman who is most easily subject to invasion by organized crime. Organized crime seems to act like a vulture that preys on those otherwise made vulnerable by many of the economic developments of the last half century. It is most disturbing, however, to learn that organized crime has begun to penetrate securities firms and the Stock Exchange itself. J. Edgar Hoover has testified: "We have over 30 pending cases (March 1, 1969) involving thefts of securities from brokerage houses. Close associates and relatives of La Cosa Nostra-figures are known to be involved in at least 11 of these cases."[3] Apparently no area is immune.

Control of business concerns has been acquired by the sub rosa investment of profits acquired from illegal ventures, accepting business interests in payments of gambling or loan shark debts, but, most often, by using various forms of extortion. Paul J. Curran, Chairman of the New York State Commission of Investigation, testified before the Subcommittee:

> From gambling narcotics, and loan sharking . . . [organized crime] has extended its tentacles into the field of commerce and industry. It has utilized its vast resources to infiltrate diverse kinds of legitimate businesses. In our investigations, the commission has found that the means used by racketeers to penetrate and to gain control of legitimate business, or simply to engage in extortion, ranged from old-fashioned muscle and violence to such more sophisticated techniques as using a big underworld name as a salesman, or merely mentioning such a name as being connected with a particular company, or "borrowing" money with no intention of ever repaying the "loan." (Hearings at 175.)

After takeover, defaulted loans are often liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques, which are called "scam." An estimated 250 such scam operations are pulled off each year, netting around $200,000 per job. Often, however, the organization, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful, the organization begins to extract a premium price from customers. Purchases by infiltrated businesses are always made from specified allied firms. With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can thus be effectively eliminated and customers can be effectively confined to sponsored suppliers.

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[2] S. Rept. No. 307, Special Committee to Investigate Crime in Interstate Commerce, U.S. Senate, 82d Cong., 1st sess. at 170 (1951).

[3] Testimony of J. Edgar Hoover, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 91st Cong. 1st sess. at 559 (1969).

The President in his message on "Organized Crime" on April 23, 1969, declared:[4]

> The syndicate-owned business, financed by illegal revenues and operated outside the rules of fair competition of the American marketplace, cannot be tolerated in a system of free enterprise.

TAKEOVER OF LEGITIMATE UNIONS

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions.[5] Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.

INADEQUACIES OF PRESENT REMEDIES

Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations. The traditional approach has been to seek through fine and imprisonment to deter or prevent the perpetration of criminal behavior. As the efforts of the Federal Government have increased, many of the Nation's most notorious racketeers have indeed been imprisoned, and many local organized crime endeavors have been substantially curtailed. Nevertheless, the stark fact remains: Not a single one of the "families" of La Cosa Nostra has been destroyed through criminal prosecutions.

The President in his message on "Organized Crime" of April 23, 1969, observed:[6]

> The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.

The Attorney General in testimony before the subcommittee said:[7]

> While the prosecutions of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.

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[4] Doc. No. 91–105, House of Representatives, 91st Cong., 1st sess. at 6 (1969).

[5] See generally S. Rept. No. 1417, Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate, 85th Cong., 2d sess. (1958); S. Rept. No. 62, Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate, 86th Cong., 1st sess. (1959); S. Rept. No. 139, Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate, 86th Cong., 2d sess. (1960).

[6] Doc. No. 91–105, House of Representatives, 91st Cong., 1st sess. (1969).

[7] Hearings at 112.

What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

NEW REMEDIES

Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Criminal approach

Fine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem. In English law, goods and chattels were automatically forfeited to the Crown upon conviction of felony; lands were forfeited upon attainder, and this common law rule was carried into the New World by the colonists. Instances of criminal forfeiture, moreover, are noted in early American reports.[8] The use of the ancient doctrine of criminal forfeiture embodied in title IX may be aptly explained by reference to the Department of Justice comments on the proposed statute:[9]

> The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics and revenue laws. Such statutes have been uniformly upheld against the objection that they violate due process on the grounds that they are wholly preventive and remedial and are designed to aid the enforcement of the particular laws in question and to restrain violations thereof. In upholding such a statute in *Goldsmith-Grant Company* v. *United States* 254 U.S. 505 (1921), the Supreme Court held at 511: "But whether the reason for sec-

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[8] See, *e.g.*, *Camp* v. *Lockwood*, 1 U.S. 393 (Court of Common Pleas of Philadelphia County, 1788), where the plaintiff, Abiathar Camp, was prevented from suing on a debt, as it was "already vested by confiscation in the State of Connecticut." The vesting was occasioned by a conviction of treason. Although the forfeiture was seldom enforced because of a lack of chattels in the hands of felons, a prominent instance occurred in New York in 1766, where the defendant's goods were forfeited upon conviction for manslaughter. See Goebel & Naughton, Law Enforcement in Colonial New York, 715, 716; Scott, Criminal Law in Colonial Virginia 107–10.

[9] In other areas, the courts have recognized that the powers of equity are better suited than those of the criminal courts for the elimination of unlawful conduct. See *Clopton* v. *State*, 105 S.W. 994 (Tex. 1907) (suit under statute to enjoin bawdy house).

> tion 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisdiction of this Country to be now displaced."
>
> Under the criminal forfeiture of section 1963, however, the proceeding is *in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise. The concept is derived from the practice well known in the early law where upon conviction of treason and certain other felonies the party forfeited his goods and chattels to the crown. *The Palmyra*, 12 Wheat. 1, 25 U.S. 1 (1827), opinion of Mr. Justice Storey at 14. According to Blackstone, the only valid reason for this type of forfeiture is that since all property is derived from society, any member of society who violates the fundamental contract of his association by transgressing society's laws forfeits his right to that property, and the state may justly resume that portion of the property which the laws have previously assigned him. *Commentaries*, Ch. 8, 299–300. XVI.
>
> While there is some indication that this concept of criminal forfeiture was in usage in the colonies, the First Congress by Act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. § 3563 which states: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. § 3563 by implication.
>
> It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of constitutional power. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), opinion of Mr. Justice Frankfurter at 441, holding that whether proscribed conduct is to be visited by a criminal prosecution or by other remedies is a matter of legislative choice. (Hearings at 407.)

Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence.

Civil approach

There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice. What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime. As a special committee of the American Bar Association observed:[10]

> The time-tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime.

Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies, including a civil investigative demand, now available in the antitrust area. The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that title IX seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.[11] Punishment as such is limited to the criminal remedies, noted above.

Ample precedent exists in the antitrust laws for these procedures. In the landmark decision *United States* v. *DuPont & Co.*, 366 U.S. 316, 326–27 (1961), the Supreme Court said of the remedy of divestiture:

> The key to the whole question of antitrust remedy is, of course, the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest.
>
> If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.

It must be remembered that the Court here was speaking of remedying an economic concentration of power, which potentially might have an adverse effect upon our economy. Title IX attacks a far more heinous threat, the use of force, threats of force, enforcement of illegal debts, and corruption in the acquisition or operation of business. If Du Pont and other related companies can be forced to rid themselves of General Motors ownership, almost without regard for the economic consequences, then it must surely follow that the removal of criminal elements from the organizations of our society by divestiture is justified. The situation may be said to cry for legislation to accomplish that result. The criminal surely can lose his right to own or hold office in a business or other enterprise as easily as can the essentially honest, but potentially too powerful, businessman.

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[10] Hearings at 557.

[11] See *Respass* v. *Commonwealth* 131 Ky 807, 115 S. W. 1131, 1132 (1909) (suit to enjoin gambling house):

> . . . [T]he remedy in equity is purely preventative. The chancellor does not punish the defendant for what he has done. This is left to the criminal courts. . . .

These provisions should effectively remove the criminal figure from the particular corrupt organization. In a like manner, through a remedy such as the prohibition of engaging in the same kind of activity in the future, the criminal element will not only be removed from an area of activity, they will also be prohibited from using the know-how acquired to start the same type of business or other organization again under a different name.

Here, too, the antitrust laws furnish ample precedent for the use of this sort of civil remedy. In *United States* v. *Grinnel Corp.*, 384 U.S. 563, 579 (1966), the district court had decreed that one Fleming should be enjoined from working for any of the corporate defendants to an antitrust suit because of constant flouting of the antitrust laws, even though no predatory practices were found to exist. The Court, while it reversed on a factual aspect of the case, acknowledged that the remedy was available if appropriate facts were found:

> Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record.

If predatory conduct may be made the basis for such a prohibition, then surely murder, extortion, and other crimes are more than equal grounds for the prohibition.[12]

In each of these illustrative cases, the courts have emphasized that the prohibition is not a penalty against any individual. It is instead a protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest. In the spirit of this background, title IX, it must be again emphasized, is remedial rather than penal. It is based upon the judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity.

Finally, the Department of Justice had this to say of the civil aspects of title IX:

> These time tested remedies . . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity.

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[12] Additional authority for prohibiting persons or organizations from engaging in certain types of legitimate activities may be found in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and *De Veau* v. *Braisted*, 363 U.S. 144 (1960), as well as numerous disbarment cases. Compare *Mugler* v. *Kansas*, 123 U.S. 623 (1887) (padlock statute upheld). Authority for remedies such as dissolution is found in *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242 (1959).

> Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated. (Hearings at 408.)

Title IX of S. 30, as amended, is derived from S. 1861, which was originally introduced by Senator McClellan for himself and Senators Ervin and Hruska on April 18, 1969.[13] In turn, S. 1861 was the product of the subcommittee's hearings on S. 1623, which was introduced by Senator Hruska on March 20, 1969.[14] Clarifying, limiting, and expanding amendments have been made with the approval of the Department of Justice. As presently drafted, title IX has the support of the Department of Justice. Opposition was expressed, however, by the American Civil Liberties Union chiefly on the grounds that the proposed statute was susceptible of abuse.[15]

Title IX represents the committee's careful efforts to fashion new remedies to deal with the infiltration of organized crime into legitimate organizations operating in interstate commerce. Its provisions are summarized above[16] and analyzed in detail below.[17] As now drafted, the committee recommends that title IX pass.

TITLE X: DANGEROUS SPECIAL OFFENDER SENTENCING

Titles I through VII of S. 30, as amended, seek to strengthen evidence gathering processes and trial procedures in organized crime cases. Titles VIII and IX fashion new substantive provisions and innovating criminal and civil remedies to meet the challenge of organized crime. As important as the new criminal provisions of those titles are, however, they deal only with the preliminary and intermediate stages of the criminal process in organized crime prosecutions. They leave untouched, once a conviction is obtained, the crucial question of penal disposition.

The primary purpose of title X, therefore, is to see to it that convicted felons prone to engage in further crime are imprisoned long enough to give to society reasonable protection. While the central thrust of the title is against organized crime, its impact can be expected to be significant across the criminal justice system as it faces the dangerous offender. Title X also has the purpose of improving the rationality, consistency, and effectiveness of sentencing by testing concepts of limiting and guiding sentencing discretion through the development of sentencing criteria, procedures and appeals.

Title X defines the "habitual," "professional," and "organized" criminal conduct which will subject a dangerous offender to an enhanced term (up to 30 years), establishes procedures for determining on notice and hearing the applicability of such a term, authorizes consideration of relevant information in sentencing, and grants dangerous special offenders and the Government a right of appeal from the result estimates put a substantial amount of capital in the hands of organized crime leaders.

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[13] 115 Cong. Rec. S3856 (daily ed., Apr. 18, 1969).

[14] 115 Cong. Rec. S2991 (daily ed., Mar. 20, 1969). S. 1623, in turn, was based on S. 2048 and S. 2049, 90th Cong., 1st sess. (1968), sponsored at that time by Senator Hruska. It was these two bills "'and all similar legislation having the purpose of adopting the machinery of the antitrust laws to the prosecution of organized crime,' that were "endorsed" by the Anti-trust Section of the American Bar Association in 1968. Hearings at 556–558.

[15] Hearings at 474–478.

[16] Supra at 34.

[17] Infra at 157.

Mr. President, it is from these huge gambling profits that organized crime is able to finance other illicit operations such as narcotics, loan sharking, prostitution, and bootlegging. This large source of illegally gained revenue also makes it possible for organized crime to infiltrate and pollute legitimate business.

The President in his message on organized crime in April of last year, characterized gambling income as the "lifeline of organized crime," and suggested that if we can cut or constrict it we will be striking close to its heart. Document No. 91–105, House of Representatives, 91st Congress, first session, at 6—1969. I need not emphasize too highly that it is in the field of gambling that the mob leader is most vulnerable to honest law enforcement. If we can remove the syndicate gambler from circulation, we will have at the same time largely eliminated the extortioner, the corrupter, the robber, and the murderer—the gangster himself.

One of the inevitable byproducts of illicit gambling, moreover, is corruption—of the police, the prosecutor, the courts—indeed, the whole system of criminal justice. Gamblers and bookmakers, in order to be free to operate, must pay off someone. The President in his message on organized crime put it this way:

> It is gambling which provides the bulk of the revenues that eventually go into usurious loans, bribes of police and local officials, "campaign contributions" to politicians . . . and to pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime. (*Ibid.*)

The report of the Permanent Subcommittee on Investigations on Gambling and Organized Crime described the problem as follows:

> It must be conceded that for various reasons, mostly justifiable and understandable, local law enforcement agencies cannot adequately cope with the grave internal threat posed by organized crime. Jurisdictional limitations and lack of sufficient funds to provide adequate manpower or modern equipment are among the most frequently cited obstacles to the attainment of this objective. While most local law enforcement officials and prosecutors are honest and dedicated in their efforts to stamp out organized crime, too often local criminal statutes are not vigorously enforced or prosecuted because a dishonest policeman or prosecutor is motivated solely by financial or political gain. (Report at 1.)

The junior Senator from Washington (Mr. JACKSON), in the course of these hearings, during an exchange with Jacob Grumet, a member of the Commission of Investigation of the State of New York, aptly expressed it this way:

> You and I know what the problem is. They buy off the judge, they buy off the prosecutor, they buy off the sheriff, and they buy off the law enforcement officers locally, directly or indirectly. (Hearings, Part 1, at 31.)

Today's corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition era. But organized crime flourishes only where it has corrupted local officials. And as the scope and variety of organized crime's activities have expanded, its need to involve public officials at every level of local Government has grown.

Mr. President, something must be done to stop this flow of money to organized crime from gambling enterprises, and we must stop the corruption of local officials and law-enforcement officers by organized crime. To do this we need new weapons. Title VIII would give the Federal Government two new means to aid the States in combatting large-scale gambling. Part A contains special findings on the character of syndicated gambling. Part B of title VIII would make it a felony for large-scale gamblers and law-enforcement officers or public officials to conspire to obstruct enforcement of State and local laws against gambling through bribery of governmental officials. Part C of this title would make it a Federal offense to engage in a large-scale business enterprise of gambling.

At this point, Mr. President, I want to make one thing very clear. No part of this title will, or is intended to, preempt local efforts in this area, but it will add to such local efforts the expertise, the manpower and the full resources of the Federal Bureau of Investigation, and other appropriate agencies of the Federal Government.

There is one other important point that I have not touched upon, and it is a point on which the Congress cannot legislate. I refer to public apathy about gambling—indeed, about organized crime in general. The public must be informed of the dangers of organized crime and must be made cognizant of the fact that each bet with the local bookie, no matter how small, is not a harmless diversion but is a part of a large-scale process leading to the eventual decay of his community, for the effects of apathy poison our whole well-being. The late Robert F. Kennedy, commenting on the relation between organized crime and street crime, put it well:

> Crime in the streets is directly related . . . to public apathy about organized crime. The young man in the ghetto who decides to steal rather than make that extra effort to find work is unquestionably influenced by the success which the numbers runner down the block has had. The bookmaker or the narcotics pusher is all too often the only conspicuous figure of success in the ghetto, the one who has demonstrated how to beat the system and gain wealth and prominence. Similarly, the worker who belongs to a corrupt union, or the businessman who must pay protection to keep his business or his life, are taught every day—as are their children—that our legal system has nothing to offer them. As long as the public cares too little about the racketeers who control the gambling and the narcotics and the prostitution that feed upon the poor and the weak, there will be youngsters who see the gangster's way as the model, the path to follow. (Address before the Columbia Law School Forum, Jan. 19, 1967, reprinted in 113 Cong. Rec. 1246 (Jan. 23, 1967).)

It is in this context, particularly, that the Senate must assess part D, which would set up, 2 years after the enactment of the bill, a Commission To Review National Policy Toward Gambling. Federal concern over gambling has a long history. Nevertheless, it is time to take stock of where our Nation is and what direction it should take in the future. We know too little about the full scope of the impact of syndicated gambling and attendant police corruption on our society, or about the most realistic way to respond to them. There is a need here for careful study and public enlightenment after the formulation of prudent action plans.

TITLE IX—RACKETEER-INFLUENCED AND CORRUPT ORGANIZATIONS

Mr. President, title IX of S. 30, originally introduced as S. 1861, was supported by the Department of Justice in these terms:

> The Department favors the objectives of S. 1861 and believes that with some possible revisions its combination of criminal penalties and civil remedies, which has been highly effective in removing and preventing harmful behavior in the field of trade and commerce, may be effectively utilized to remove the influence of organized crime from legitimate business. (Hearings at 404, 406.)

The subcommittee and the full committee have now agreed with the Department on their suggested revisions and, along with other improving amendments, have approved title IX.

The infiltration of legitimate business by organized crime has been increasingly documented in the past year. Once it invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices. It sometimes uses terror tactics to obtain a larger share of the market. Labor unions are infiltrated, and then labor peace is sold to businesses. This does not inure to the benefit of the workingman. To the contrary, for example, as documented in the grand jury report I noted earlier and inserted in the RECORD on December 5, 1969, in New Jersey members of the mob recently required payments from a contractor so that nonunion men could work at lower wages on a project. In business, the mob bleeds a firm of assets, then takes bankruptcy. It steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions. It evades taxes and thereby gains an unfair advantage. It monopolizes goods and services and thereby raises prices. Through the violence used in its operations and its rigidly enforced code of silence, as well as exploitation of nonmembers in its schemes, the mob seeks to gain immunity from the rules of our society governing business and labor practices. We cannot afford to allow it to succeed in this endeavor.

Mr. President, title IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.

Title IX uses three primary devices to achieve these ends—criminal forfeiture, civil remedies which have proven successful in the antitrust area, and a number of civil investigative procedures.

The concept of criminal forfeiture is an old one in our common law. It was extensively used in England and had some limited use in the Colonies. Title IX, drawing on this early history, would forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity. To bring this special criminal remedy into play, the offender must be chargeable in the commission of at least two racketeering acts, each of which is a crime apart from title IX.

Since enactment of the Sherman Antitrust Act in 1890, the courts have used several equitable remedies, and developed new ones to implement the language of 15 U.S.C. sections 1 and 2. I believe, and numerous others have expressed a similar belief, that these equitable devices can prove effective in cleaning up organizations corrupted by the forces of organized crime. The first step in cleaning up an organization will be to require the mob to divest itself of its holdings in legitimate endeavors, where its members have abused that right by the condemned practices. In some cases, the organization will no doubt be so corrupt that it will have to be dissolved. Once the mob is removed, an injunction against its members ever again entering that particular type of organization should prove effective to prevent its return to corrupt anew.

As the criminal process has a grand jury for investigations, the civil process will need an investigative arm to determine whether there have been violations. To accomplish this end, the Attorney General is authorized to use either a civil investigative demand or investigative powers now existing in other agencies.

Mr. President, I am sure that there are some who are not aware of the extent of infiltration of our legitimate organizations by the mob. The facts, however, are truly disturbing.

According to Internal Revenue sources, of this country's 113 major organized crime figures, 98 are involved in 159 businesses. In like manner, the President's Crime Commission in 1967 reported that racketeers control nationwide manufacturing and service industries with known and respected brand names. It has also been reported that the mob controls one of the largest hotel chains in the country, dominates a bank with assets of from $70 to $80 million, operates a $30 million yearly gross laundry, and so on. In an eastern State the mob burned several stores and killed employees of a large grocery chain—the venerable A. & P. Nevertheless, violence is not the mob's only technique. Approximately 250 syndicate-inspired bankruptcy schemes are perpetuated annually, each involving upward of $250,000 in merchandise or material. Organized criminals, too, have flooded the market with cheap reproductions of hit records and affixed counterfeit popular labels. They are heavily engaged in the illicit prescription drug industry.

This is just a sampling. I could go on at length in this fashion, but I think the necessary point has been made.

Mr. President, I ask unanimous consent that a partial list of businesses and industries in which organized crime has been active be printed at this point in the RECORD.

There being no objection, the list was ordered to be printed in the RECORD, as follows:

PARTIAL LIST OF BUSINESSES AND INDUSTRIES IN WHICH ORGANIZED CRIME HAS BEEN ACTIVE

Accounting, Advertising, Air freight, *Automobile agencies, Awnings, *Bakeries, Banking, Barber shops, Beauty shops, Bonding, Bowling alleys, Breweries, Catering, Charities, and Chemicals.

Cigarettes, *Coal, *Construction, Consulting, Copper, Country clubs, Credit cards, Dairy products, Demolition, Drugs, Electrotyping, Excavation, Factoring, and Flowers.

Foundations, *Funeral homes, Furs, Garages, Garbage removal, *Garments, *Grocery stores, Hardware, Hi-fi components, Hotels and motels, Ice cream, *Importing or exporting, Insurance, Jewelry, and Juke

Laundries & dry-clean, *Linen, Liquor, Lithography, Lumber, *Manufacturing, Metal plating, Newspaper distribution, Night clubs, Oil and gas leases, Oil prospecting, Paper, Paving, and Picnic groves.

Pipelines, Produce and meat, Public Relations, *Race tracks, Radio, Railway express, Ranching, Real estate, Recording, Resorts *Restaurants and bars, Roofing material, Savings & Loan assoc., Shopping centers, and *Show business.

Soft drinks, Sports generally, Steel, Stocks and bonds, Surplus property, Tailoring, Taxicabs, Television, *Trucking Vehicle leasing, *Vending machines, Waterfront services, Window washing, and Wire service.

(S. Rep. No. 307, 82d Cong., 1 Sess. at 170-81 (1951).)

TITLE X—DANGEROUS SPECIAL OFFENDER SENTENCING

Mr. McCLELLAN. Mr. President, title X would authorize extended prison sentences for carefully defined categories of particularly dangerous special offenders.

Title X authorizes a Federal prosecuting attorney to notify an adult felony defendant and the court before hearing any grounds for finding the defendant to be a dangerous special offender. The concept of dangerousness is defined, as are the types of special offender: recidivist, professional offender, and organized crime offender. The court determines the accuracy of the allegations upon a full hearing with substantial presentence report disclosure and rights to notice, counsel, compulsory process, and cross-examination, imposes sentence up to a special maximum of 30 years, and records its findings and reasons for the sentence. The title authorizes appellate review of the sentence at the instance of the defendant or the Government, preserves the right of a Federal court to consider the fullest information possible in determining an appropriate sentence, and establishes within the FBI a central repository for admissible copies of conviction records.

Title X would be a dramatic improvement of our law in the one area, sentencing, which is most important to the great majority of defendants and yet has received the least legal development by the Congress and the courts. The basic difficulties in our sentencing law have been that, for a given crime, every offender has been exposed to the single maximum authorized punishment set by the Congress, and that a trial court's selection of a particular penalty at or under that maximum has not been subject to appellate review. Those two factors have led the Congress, as it has fixed maximum sentences for individual offenses over the years, to set the maximums at compromise levels which curb somewhat the danger of excessive sentences for ordinary offenders, but are of insufficient length to protect society by incapacitating recidivists, professionals, and Mafia members or others engaged in organized crime.

The inadequacy of sentences imposed upon organized crime leaders has been well known to racket prosecutors for years. Our people, too, are aware of the facts. A Gallup poll early last year found that 75 percent of those interviewed thought that our courts did not deal harshly enough with criminals. New York Times, February 16, 1969, page 47, column 1. A recent staff study by the Criminal Laws Subcommittee based on FBI sentencing data, moreover, confirms that experience and the judgment of our people. That study appears in the CONGRESSIONAL RECORD, volume 115, part 25, page 34389, so it is necessary now to point out only that two-thirds of La Cosa Nostra members included in the study and indicted by the Federal Government since 1960 have faced maximum jail terms of only 5 years or less, and that nevertheless fewer than one-fourth have received the maximum sentences, 12 percent have received no jail terms, and the sentences of the remainder have averaged only 40 to 50 percent of the maximums.

Statistics, however, outline only bare bones. Several examples will flesh out this deplorable situation. One of the worst gangsters uncovered in the labor racketeering investigation of the Select Committee was Anthony "Tony Ducks" Corallo, then a captain in the Lucchese family of La Cosa Nostra. It was Corallo who helped James Hoffa gain control of New York City's 140,000 teamsters. Our hearing record showed how this thug brought in 43 hoodlums with records of 178 arrests and 77 convictions for crimes ranging from theft, robbery, burglary, and stinkbombing to extortion and murder. One New York employer told how he hired Corallo simply to walk into his plant and "glance at the employees to keep them in line." The late Robert F. Kennedy, our committee counsel, commented, "This seemed rather funny at the time. But when Tony Ducks appeared on the witness stand and turned his glare on us, I changed my mind." Kennedy, "The Enemy Within," at 81—1960.

It was just such experiences as this that led Kennedy, when he became Attorney General, to mount the first truly effective concentrated Federal attack in our Nation's history on organized crime, and by 1962 Corallo had been convicted under 18 U.S.C. § 1952, the Federal Anti-Racketeering Act, for conspiracy to pay a $35,000 bribe to a New York

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*Business connected with participants in the infamous 1957 Apalachin meeting (S. Rep. No. 1139, 86th Cong., 2d Sess., pt. 3 at 487-88 (1960).)

tween East Capitol and Massachusetts Avenue?

On Friday, January 16th, about 11:00 P.M., our good friends and neighbors were robbed at gun point in the 100 block of Third Street, Northeast, then forced to drive their abductor cross town. Last evening shortly after 8:00 P.M. a woman was attacked in front of our house.

These are just two of the recent crimes in our neighborhood. Our corner grocer at Third and Maryland closed because of many holdups, and the cleaners at Third and C is forced to keep their door locked. I would like to do an article entitled "Two Blocks From the Capitol" which would far surpass the title "Ten Blocks From the White House."

In my opinion the former precinct plan was much more effective than the present Districts. Our first need is beat men and officers from the Canine Corps. Scout cars are not the answer. I'm annoyed at being a prisoner in our home, and shall certainly appreciate any measures you can take so that we may all once more live with some feeling of security.

Sincerely yours,

Mrs. Arthur J. McShane.

Mr. President, I do not know this lady and did not know of her plight until today. I did know of another similar story. One of my employees, a committee employee, was robbed within less than a block of the door where he enters the Senate Office Building in which he works, just before Christmas. It is all over town, and many such crimes are not reported.

Of course, this bill, as I say, is not directed primarily to the District of Columbia. But many of these robberies, many of these muggings, many of these crimes of violence that are taking place in the District of Columbia, Mr. President, are motivated primarily to get money to satisfy the appetite of the drug addict; and it is the Mafia, it is organized crime, that is supplying that poison to them. This bill can have a significant effect in reducing street crime in the District and across the Nation.

Mr. President, I wish to insert in the Record one other letter. I think all Senators received this letter, which is dated January 19, 1970, from Hon. Hilton Davis, general manager for legislative action, Chamber of Commerce of the United States. The chamber strongly supports this bill.

I ask unanimous consent to have printed in the Record the letter to which I have referred, together with an enclosure.

There being no objection, the letter and enclosure were ordered to be printed in the Record, as follows:

Chamber of Commerce
of the United States,
Washington, D.C., January 19, 1970.

Hon. John L. McClellan,
U.S. Senate,
Washington, D.C.

Dear Senator McClellan: In the next few days, I understand the Senate will consider S. 30, the Omnibus Organized Crime bill reported by the Judiciary Committee in December.

The Board of Directors of the Chamber of Commerce of the United States has approved support of many of the principal provisions of S. 30 as vitally needed legislation to help federal officers combat organized crime. A copy of this statement of approval is enclosed.

Every facet of our society is adversely affected by the extensive moral corruption resulting from the operations of organized crime. Particularly the youth of our Nation are being victimized by the illicit sale of narcotics and by gambling operations, both closely linked to organized crime.

This legislation is also needed to strengthen the legal tools for halting the infiltration of organized crime into legitimate businesses in our Nation. Many of its activities are now permeating legitimate businesses on an alarming scale.

The impact of organized crime on the national economy has reached phenomenal proportions. Latest estimates are that organized crime in America takes in more than $30 billion, and possibly as much as $50 billion annually, from its operations.

We urge you to give S. 30 favorable consideration when it reaches the Senate floor.

Cordially,

Hilton Davis,
General Manager, Legislative Action.

Recommendations on Organized Crime Legislation as Approved by the Board of Directors of the Chamber of Commerce of the United States, November 13, 1969

COMBATING ORGANIZED CRIME

To strengthen Federal efforts to combat organized crime, the National Chamber supports legislation providing for:

1. Extension of the grand jury system allowing the issuance of a presentment or report on misfeasance, non-feasance or corruption of public officials or their institutions.

2. Increasing investigatory and prosecutorial tools by implementing a Federal immunity provision, allowing the taking of depositions of witnesses, permitting introduction into evidence of declarations of co-conspirators, and codifying existing civil contempt proceedings.

3. Improving the system for protecting witnesses through Federal financial and other assistance.

4. Strengthening the Federal Government's authority to eliminate organized crime's economic power base by combating interstate gambling operations and the infiltration of legitimate business; and by creating a Federal study commission to examine the extent and effects of gambling upon society and the economy.

Support of the foregoing principles is with the understanding that such legislation will provide appropriate protection to the rights of the individual under the Constitution, and that specific provisions of any bill that deals with the Internal Revenue Code will be referred to appropriate Chamber committees.

Mr. McCLELLAN. In conclusion, I say that this measure is open to amendment. Maybe some amendments can be adopted that will strengthen and improve it. But I do not think there is anything in the bill that should be taken out. Perhaps my colleagues will disagree with me.

However, when we finish with this bill, and come to a final vote, I want every Member of the Senate to stand up and vote "yea," to let the world know—to give some comfort to the victims of organized crime in this country, and the potential victims—and that is every one of us—wherever they are—to give some comfort and reassurance to the people that Congress is alert, that the Senate of the United States is becoming aggressive in this field, and that it is resolved and determined to enact any law within the framework of the Constitution that will strengthen law enforcement in this country, and deal with this criminal element effectively, to the end that it may be eradicated from our society.

I yield to the distinguished Senator from North Carolina.

Mr. ERVIN. Mr. President, I compliment the distinguished Senator from Arkansas and his principal cosponsor of this measure, the distinguished Senator from Nebraska (Mr. Hruska), and the members of the staff of the Subcommittee on Criminal Laws and Procedures, on the fine work which has brought this bill thus far along the legislative road.

I should like to make this observation: Last May, I became personally acquainted with crime in the District of Columbia. There was a North Carolina boy, from Mecklenburg County, N.C., whom I had given a position in the Senate Post Office, in the Senate Office Building. He was stabbed, robbed, and killed on the streets of the District last May.

His roommate said he did not have more than $10 or $12 on his person at that time. In other words, here were people who were willing to take the life of a fellow human being, who was giving them no trouble and who was traveling peacefully along the streets of the District of Columbia, in order to get a few paltry dollars.

I reiterate that I think the distinguished Senator from Arkansas and the distinguished Senator from Nebraska, and the counsel of the subcommittee, deserve the thanks of the American people for bringing this bill thus far along the legislative road.

Mr. McCLELLAN. I thank the distinguished Senator. I want to express my appreciation to him as a member of the subcommittee which processed this bill for the valuable assistance he gave us, his wise counsel, and his enthusiastic support of these provisions of the bill, the titles that are now before us; and I certainly join with him in complimenting the staff, which I shall do more elaborately at the conclusion of the handling of this bill. We have been most fortunate in having a highly competent staff, and, with respect to the staff on both sides of the aisle and the Members on both sides of the aisle, as I said at the beginning, this has been a labor in which there has been less politics, I think, for a bill of this magnitude, than any I have participated in since I have been in the Senate.

There has been a concerted, united, dedicated effort on the part of all members of the committee to try to bring out a bill in this area of criminal justice that will be effective and productive in dealing with organized crime.

Mr. President, I yield the floor.

Mr. HRUSKA. Mr. President, those of us who are interested in the discussion and the passage of the pending bill appear in the Chamber today with a deep sense of assurance in the quality of the work product of the Committee on the Judiciary as seen in this bill, S. 30.

I am able to say this for a number of reasons. Perhaps the chief and most meaningful of these reasons is the diligence, the dedication, the persistence, the talent, and the genius of the chairman of the Subcommittee on Criminal Laws and Procedures, the Senator from Arkansas (Mr. McCLELLAN). His attributes as a legislator are well known to all of us. We have learned to admire him and to rely upon his judgment and upon his vast experience in the fields to which he devotes his efforts. In his functioning, he is always of an open mind. He is always constructive. He is always fair to all who come up with new ideas that they wish considered during the study of any measure.

A proof of his great effectiveness, I think, was illustrated this afternoon when Senator McCLELLAN proceeded with and concluded his explanation of this bill. It was an impressive and very fine presentation of a vital and highly necessary piece of legislation. As I sat here listening to his exposition, and later to his plea for early and effective action on this crucial legislation, I could not help but wish that all of the Members of this body as well as the Members of the House of Representatives had had a chance to listen to the eloquence and persuasiveness which he commands. I wish all Members of the Congress could capture the sense of urgency which he was able to impart for the consideration and early approval into law of the measure we are now considering.

Our feeling of assurance in presenting S. 30, however, is also based upon varied sources of its substantive and component parts and the careful processing accorded them before the bill was assembled into its final form. A number of other bills independently introduced in this body were resorted to for material that found its way into S. 30. In some instances they were incorporated into the bill as separate titles, and there are 10 titles in all in this measure. The result is a well-balanced and well-rounded approach to the problem at hand, a problem that finds its basis in a very grave and serious situation which confronts the Nation.

Mr. President, the Nation's crime problem has never been more acute than it is today. Crime of all kinds is on the increase. Crime and the very fear of crime are daily eroding the basic quality of life of millions of Americans. Nowhere is this erosion more critical than in the field of organized crime which, despite earnest efforts to control it, continues to grow at an alarming pace.

Mr. President, the measure before the Senate today is the result of many long hours and weeks of thoughtful analysis and toil. It is designed to correct a very serious malady. The organized crime problem has been of grave concern to me for many years, and all of us have been very distressed over the inability of the Government to make any significant gains in eradicating it. There are several reasons for this failure. The organized crime bill is an attempt to remedy these failures and to better equip the law enforcement community in dealing with the problem.

It has been my privilege to introduce some of the measures which now form separate titles of S. 30 and of cosponsoring the rest with the Senator from Arkansas (Mr. McCLELLAN). The bill was closely scrutinized in the Criminal Laws and Procedures Subcommittee and I am satisfied as to its practicality and constitutionality. I support the entire bill—subject, of course, to the caveat very properly suggested by the Senator from Arkansas, that, as we proceed in the consideration of this bill, together with any amendments that will be proposed, we certainly will hold an open mind and not consider that S. 30 in its introduced form, as now pending, is necessarily a perfect or even a final version.

Investigations conducted by Congress and the law enforcement agencies during the past two decades, and most recently by the President's Commission on Law Enforcement and Administration of Justice, have established beyond any doubt that organized crime is a reality which exists in our midst and pervades every section of the Nation. According to the National Crime Commission, while the core of the organized crime effort in the United States consists of 24 major groups operating as criminal cartels in large cities across the Nation, these groups are allied with other racket enterprises to form a loose confederation operating in both large and small cities. It involves thousands of criminals, and its actions are the result of intricate conspiracies carried on over many years. Its aim is the amassing of huge profits derived from control of such illegal activities as gambling, narcotics, and loansharking. It is also deeply involved in other activities such as robbery, larceny, and arson.

In recent years, organized crime has become increasingly diversified and has become entrenched in legitimate businesses and in labor unions where it employs terrorism, extortion, tax evasion, bankruptcy fraud and manipulation, and other measures to drive out lawful owners and officials. Also, wherever organized crime exists, it corrupts public officials and wields extensive political influence which insulate its activities from governmental interferences.

Corrupt officials and bribed law enforcement officers operate as "a silent conspiracy" in support of organized crime. The syndicate could not continue to operate without corrupt judges and prosecutors, or without the assistance of a handful of bribed police.

Testimony before the subcommittee during our hearings on this bill not only disclosed how prevalent corruption of local police is, but it furnished a striking illustration of the fact that it is not at all limited to the so-called crime centers of New York, Miami, Chicago, and Las Vegas.

The National Crime Commission, after analyzing the difficulties experienced by law enforcement agencies in bringing successful prosecutions against members of organized crime, concluded:

> From a legal standpoint, organized crime continues to grow because of defects in the evidence gathering process. Under present procedures, too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor.

The Organized Crime Control Act of 1969, adopting as it does the best features of the recommendations of the National Crime Commission, seeks to remedy these defects by revising and strengthening the procedural aspects of the evidence gathering process.

Title I, for example, recognizes that the grand jury is without peer as an instrument of discovery against organized crime, and provides for the impaneling of special grand juries, in addition to regular grand juries, in districts containing more than 4 million inhabitants or where the Attorney General certifies that one is necessary because of criminal activity in the district. Such special grand juries would be empowered to select their own foreman, to extend their term up to 36 months, to request, in case of need, that an additional grand jury be empowered, and, most significantly, to have restored their ancient power to issue public reports regarding organized crime conditions in the district. These reforms would make this venerable institution less an arm of the court and more of an independent body with an unfettered duty to seek out and destroy organized crime.

The other procedural reforms contained in titles II through VII, dealing, respectively, with general immunity, recalcitrant witnesses, false declarations, protected housing facilities for housing Government witnesses, depositions, litigations, and title X, dealing with dangerous special offender sentencing, are all necessary complements of the reinforced grand jury powers. These provisions will insure the necessary quantity and quality of evidence sufficient for valid indictments and convictions of organized crime figures. They provide the imposition of appropriate sentences for such convicted professional or organized crime offenders. These long overdue remedies are indispensable legal tools for providing our law enforcement officials with the evidence necessary to bring consistently effective criminal sanctions to bear on the leaders and participants of organized crime.

In addition to these procedural reforms, this act contains two substantive provisions of major significance in the struggle against this fearsome national enemy. Title VIII recognizes that large-scale illegal gambling operations provide the chief source of revenue for organized crime and are dependent upon the facilities of interstate commerce. Therefore this bill strikes out at such activities by making it unlawful to engage in a scheme to obstruct the enforcement of State law to facilitate an "illegal gambling business." An "illegal gambling business" is defined as, first, violating State law, second, involving five or more persons, and third, operating in excess of 30 days or having a gross revenue of $2,000 in any single day. It also makes it unlawful to engage in the operation of such an "illegal gambling business" itself.

As President Nixon stated in his April 23, 1969, message on organized crime:

> The purpose of this legislation is to bring under Federal jurisdiction all large-scale illegal gambling operations which involve or affect interstate commerce. The effect of the law will be to give the Attorney General broad latitude to assist local and state government in cracking down on illegal gambling, the wellspring of organized crime's reservoir.

(At this point Mr. GOLDWATER took the chair as Presiding Officer.)

Mr. HRUSKA. Mr. President, the second substantive provision of this act is contained in title IX, Racketeer Influenced and Corrupt Organizations. This title contains a rather novel, and in my opinion, a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business and unions.

Some measure of the actual and potential impact of this facet of organized crime's activities on our economic system may be gaged from the report of the National Crime Commission which found that it has to an alarming degree acquired both open and concealed ownership in a broad variety of legitimate enterprises, including production and service industries where it has established strong footholds.

The New York Times in its edition of October 14, 1969, reported that a recent survey of the business interests of 113 of the major underworld figures in the Nation disclosed that 98 of them were found to be engaged in legitimate businesses, including extensive holdings in casinos and nightclubs, land investment and real estate, hotels and motels, vending machine companies, restaurants, trucking concerns, wholesale food distributorships, sports and entertainment, and financial institutions. The Wall Street Journal on January 12, 1970, reported the overwhelming penetration and control of legitimate business in the New Orleans area by organized crime figures.

When organized crime infiltrates a legitimate business, its whole method of operation counters our theories of free competition and acts as an illegal restraint of trade. Whether a business is purchased from funds derived from its many unlawful activities, or whether it is acquired by extortion and violence, its aim is monopoly. It employs physical brutality, fear and corruption to intimidate competitors and customers to achieve increased sales and profits. The vast economic power concentrated in this giant criminal conglomerate constitutes a dire threat to the proper functioning of our economic system.

Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods. Stated simply, this legislation makes it unlawful for any person to acquire an interest in or establish an enterprise engaged in interstate commerce by the use of income derived from "a pattern of racketeering activity" which is defined in terms of a number of existing criminal offenses characteristic of organized crime activity. It would also prohibit any person from acquiring or maintaining any interest or control of any such enterprise by a pattern of racketeering activity, and likewise prohibit any person employed by or associated with such an enterprise from conducting the enterprise's affairs by a pattern of racketeering activity.

These unlawful acts which i have just described would subject violators to strict criminal penalties of fines of up to $25,000 and prison terms of up to 20 years. But the principal value of this legislation may well be found to exist in its civil provisions which employ the time-tested antitrust remedies of injunction, divestiture, dissolution, and reorganization which have been highly effective in removing and preventing harmful behavior in the field of trade and commerce. There is abundant precedent for applications of these civil remedies to the conduct sought to be prohibited by this legislation in decisions of the Supreme Court upholding similar civil remedies in antitrust cases.

I believe that the combination of criminal and civil penalties in this title offers an extraordinary potential for striking a mortal blow against the property interests of organized crime. In his April 23, 1969, message on organized crime, President Nixon stated:

> The injunction with its powers of contempt and seizure, monetary fines and treble damage actions, and the powers of a forfeiture proceeding, suggest a new panoply of weapons to attack the property of organized crime—rather than the unimportant persons (the fronts) who technically head up syndicate-controlled businesses. The arrest, conviction and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail. However, if we can levy fines on their real estate corporations, if we can seek treble damages against their trucking firms and banks, if we can seize the liquor in their warehouses, I think we can strike a critical blow at the organized crime conspiracy.

These are new and innovative techniques. They have not been tried before against the racketeers. But this is just what is needed if any significant gains are to be made.

We must give no mercy to the soldiers of organized crime. If it takes an antitrust provision, or a concentrated effort to strangle the narcotics traffic, or a raid on the cartels of gambling, all of us, and citizens everywhere must be prepared to go forward with the programs which will make organized crime unprofitable, unacceptable, unattractive, and vulnerable to criminal prosecution on a wider scale.

The tone and the effectiveness of any government is set at the top. Though our Government must depend on the resources of its citizens, the example and the efficiency at the top level of Government can pattern the degree and the morale of our individual commitments to society's goals. I think we have a Chief Executive and an Attorney General who are thoughtful advocates of a persistent effort in the fight against crime. They have demonstrated that they are willing to use, and they have used, some of the tools recently conferred upon law enforcement officials by the Congress in the battle against organized crime. The most notable illustration in that regard is the use of electronic surveillance which was enacted as a part of the Omnibus Crime Control and Safe Streets Act of 1968, but which tool was not used until within the past 12 months.

But Mr. President, even those at the top cannot do the job alone. We here in Congress must do our part. We must equip the administration with the tools it needs. With favorable consideration of S. 30 we all will have taken a significant step in the proper direction.

It is my earnest hope that it will be promptly considered and that it will promptly ripen into a full-fledged and effective statute.

Mr. YARBOROUGH. Mr. President, the bill before us today, S. 30, the Organized Crime Control Act is designed to fulfill the first requisite of organized society: to protect its members from injury, crimes, and violence. The Subcommittee on Criminal Law and Procedure, chaired by the distinguished Senator from Arkansas (Mr. MCCLELLAN), has held extensive hearings on this bill and the committee has prepared an excellent weapon for the fight against organized crime in our Nation. The bill, as amended and reported by the Committee on the Judiciary, evidences great diligence and care in its preparation for the war we must wage against this cancerous threat to our society. I would like to commend the distinguished Senator from Mississippi (Mr. EASTLAND) and the Committee on the Judiciary for the thoughtfully considered amended bill, which synthesizes a number of separate bills, all directed toward an attack against organized crime.

Organized crime threatens the very foundations of our society. Its victims are legion, but it preys primarily on the poor and the uneducated and adds further oppression to the social and economic disadvantages already borne by these people.

Organized crime threatens the security of the Nation by terrorizing, through physical and economic threats, the innocent businessman and the individual citizen. One of the most pernicious threats posed by organized crime is to our youth, by making a business out of corrupting the hope of our Nation with deadly narcotics and dangerous drugs. It is time for us to muster our forces and fight to save our society, through a full-scale attack on organized crime. This bill, S. 30, provides modern armament for this struggle.

The bill provides the law enforcement authorities essential tools to prepare their cases against organized criminals by making it possible to obtain witnesses, protect those witnesses, and to compel those witnesses to testify.

This bill realistically strikes at the economic roots of organized crime, and in title VII creates new substantive crimes defining and punishing the promotion of, and participation in an "illegal gambling business."

The approach of the bill is to define an "illegal gambling business" in terms of the number of people involved and in terms of gross receipts and length of operation. The gambling activity must be conducted by five or more people, either operating for 30 days or more or having

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ORGANIZED CRIME CONTROL ACT OF 1969

The PRESIDING OFFICER. Under the previous order, the Chair lays before the Senate the unfinished business, which will be stated.

The ASSISTANT LEGISLATIVE CLERK. A bill (S. 30) relating to the control of organized crime in the United States.

Mr. THURMOND. Mr. President, the problem of crime in American society has reached crisis proportions. Those of us who live in the Nation's Capital are very familiar with the climate of fear created by criminal activities. Fear for one's bodily safety and for the security of one's home and property has become a standard condition for living in Washington and in most other major American cities.

Citizen reaction to the growth of criminal activity throughout our Nation was in part responsible for the election of President Nixon. As President he has sent to the Congress a package of legislation designed to reverse the crime rate throughout the country and here in Washington. Hearings have been held and the Subcommittee on Criminal Laws and Procedures and the full Judiciary Committee have acted favorably on the bill now before us known as the Organized Crime Control Act of 1969. I believe it is time for this body to recognize the importance of this problem by passing this legislation which will create additional weapons for the President's arsenal in the war against crime.

Mr. President, when most of us think of organized crime, we immediately think in terms of illegal gambling and other forms of vice. We should remember, however, that the growth of organized crime has contributed greatly to crime in the streets. The high incidence of armed robbery of both businesses and individuals and the increasing rate of breaking and entering into private homes can be traced to the increase in narcotic addiction. Dope addicts have to steal to support their habits. They must either steal cash or goods which can be "fenced" for cash. Organized crime is instrumental in the illegal narcotics trade and also in the fencing of stolen goods. Thus we can see that if organized crime is successfully attacked, a decrease in street crime which affects all citizens would also occur.

The calculated growth of crime and particularly organized crime through various activities such as gambling, loan sharking, narcotics and other forms of vice has numerous causes, but chief among them has been the U.S. Supreme Court, which has tied the hands of law-enforcement officers by creating unrealistic procedures that work to the advantage of organized crime.

Mr. President, part of the crime problem we face in this country comes from an insidious and invisible empire designated by various names, the best known of which are the Mafia and the Cosa Nostra. It is because of various Supreme Court opinions that have been handed down and the runaway crime rate that we are now considering S. 30, which contains provisions designed to obtain convictions of criminals. Let us not, like the Supreme Court, create loopholes through which criminal can walk, by narrow and unrealistic technical and procedural considerations.

The crime situation has changed since I was a circuit judge, and I feel that the language of this bill is now mandatory. There is sound legal argument to support each and every provision of this legislation. It was hammered out in the subcommittee, and carefully considered by the full committee, after several productive meetings in which members of the committee gave their best effort to developing the most effective legislation possible within constitutional boundaries.

Mr. President, I shall briefly review the bill. Under title I, special grand juries to concentrate on criminal activities are provided for in major metropolitan areas. These grand juries will be empowered to stay in session up to 36 months, can subpena witnesses, compel testimony and issue public reports as well as bring indictments. Under title II, provisions are contained in the bill for expanding the granting of immunity from self incrimination in legislative and court proceedings in order to make better use of witnesses in criminal proceedings. Under these provisions, immunity from the use of testimony itself, rather than from prosecution itself is afforded. This will facilitate compelling witnesses to testify, as this immunity will prevent the use of the fifth amendment. Title III provides for contempt proceedings without bail for recalcitrant witnesses in grand jury and court proceedings. Title III also makes witnesses who avoid State proceedings subject to Federal prosecution. This, in conjunction with the previous title concerning immunity, will help prosecutors in obtaining convictions where they have been in the past hampered because they were unable to secure testimony. Title IV makes it easier to convict witnesses of perjury. Title V provides that the U.S. Attorney General can maintain witnesses and their families under Federal protection when they testify in matters involving organized crime. Title VI provides for the taking of depositions of witnesses in criminal cases in order to preserve their testimony in the event they are unable to testify. Title V and title VI should be most beneficial in aiding Federal prosecutors in securing the testimony of witnesses against people involved in organized crime. The present difficulties in gathering evidence have been a substantial impediment to the effective prosecution of criminals involved in organized crime.

Mr. President, title VII of the bill deals with litigation concerning evidence. This is a difficult and complicated subject. The most common situation which will be covered by this particular provision would be a criminal trial in which a defendant tries to delay the trial by getting into extensive and entangled litigation on questions regarding admissibility of evidence. This provision creates a type of statute of limitation so that, as to a crime occurring 5 years after the event, a criminal can no longer raise questions related to illegally obtained evidence in prior prosecutions.

We must remember that defendants who are part of organized crime have the funds with which to secure the services of experienced criminal lawyers who are experts in the use of technical and procedural arguments to secure the release of their clients. This is a complicated device, but it is one which is necessary in order to meet the requirements of modern-day criminal jurisprudence.

Mr. President, a significant portion of this legislation deals with syndicated gambling, and provisions are contained in the bill designed to severely curb and limit the activities of gamblers, and thus remove a major source of income from organized criminals. One such provision would allow both State and Federal law enforcement agencies to use evidence obtained by means of electronic devices in gambling prosecutions.

In this day and time, racketeers are very much interested in gaining inroads into legitimate business in order to set up "fronts" for their illegal operations. The committee has come up with a provision, designated as title IX of S. 30, which makes it possible to ferret out and expose such activities of criminals and their influence in supposedly legitimate businesses through the use of antitrust devices. This is an important provision of this legislation which will go a long way toward eliminating an avenue whereby the criminal element has disposed of its ill-gotten gains through legitimate business.

Mr. President, one of the favorite devices of organized crime is to infiltrate a company, build it up, and then let it go broke so that it can take advantage of certain tax provisions and other devices thus disposing of or protecting a large treasury of illegally obtained dollars. This provision will help in curbing this activity.

There are some in this country who make a profession of being criminals and they are very difficult to deal with. Putting them in prison for a short period of time does not do much good. First, it does not take them out of circulation permanently; second, they are hardened criminals and do not intend to be rehabilitated. The special offenders provision in this legislation provides for a special sentencing of dangerous repeat offenders. It would allow the removal of professional criminals from the American environment.

Mr. President, these provisions are new and unique approaches to combat organized crime. These ideas are the products of fine legal minds in the Department of Justice; they have also been approved by those of us on the Judiciary Committee and on the subcommittee who have practiced law and are familiar with the problems of law enforcement and the problems of criminal activities.

Mr. President, people across this Nation are crying out for the Congress to act on the problems of organized crime, for the Congress to assume its reponsibility and provide the tools whereby these insidious criminals may be brought to justice, before their power inreases even more. Much of the growth of organized crime and violence can be directly linked to the growth and magnitude of the criminal organization known as the Mafia or Cosa Nostra. This legislation provides an effective way to destroy their legitimate business fronts, expose their leaders and commit them to prison for their crimes.

Mr. President, undoubtedly there are those among us who will urge that various amendments be adopted to this bill. The cause of civil liberties will be advanced as a reason for weakening the bill. I urge my colleagues to reject attempts to weaken this bill. Experience has shown that defendants connected with organized crime have a much greater acquittal rate than other defendants. Much of this has been related to the difficulty of collecting and admitting evidence in these cases. The Mafia, or Cosa Nostra, is organized on the principle of protecting the leaders from criminal prosecution. Extensive attempts to fix cases through bribery and intimidating witnesses, jurors, and even judges have been uncovered. At present, we are losing the war against organized crime. Law enforcement personnel on both the Federal and State levels must have sufficient weapons if they are to prosecute these criminals effectively. I urge that the Organized Crime Control Act of 1969 be promptly passed and that all amendments which would weaken this legislation be defeated.

ANALYSIS OF S. 30, THE ORGANIZED CRIME CONTROL ACT

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Virginia (Mr. POFF) is recognized for 10 minutes.

Mr. POFF. Mr. Speaker, the Chamber of Commerce of the United States has long been a respected leader among business groups. It has also now taken a place in the forefront of private associations aiding Government efforts against organized crime.

Last year the national chamber published its "Deskbook on Organized Crime," a concise, well-documented, thorough, and practical summary of the threat posed by organized crime and the ways in which private citizens can respond to it.

Then, on November 13, 1969, the executive board of the national chamber expressed the chamber's support for the general thrust of S. 30, the "Organized Crime Control Act of 1969," and endorsed a number of specific legislative proposals found in the bill—see the CONGRESSIONAL RECORD, volume 115, part 27, page 36217. As Members know, after a full year of study and consideration, S. 30 subsequently passed the Senate by a vote of 73 to 1, and it is presently pending in the House Judiciary Committee.

Mr. Speaker, the national chamber has now elaborated upon its endorsement of the act by publishing two most instructive reports concerning S. 30—Legislative Department, Chamber of Commerce of United States, "Here's the Issue—Organized Crime Control," February 27, 1970, volume 9, No. 3; Chamber of Commerce of United States, "Congressional Action Special Report—Organized Crime Control," February 27, 1970.

The reports summarize the background of the measure, describe its major provisions and their various applications. They are thoughtful and accurate analyses of S. 30, and they should be of value both to local chapters and members of the chamber of commerce as well as to other citizens and Members of Congress interested in improving our means for dealing with organized crime.

A particularly excellent feature of one of the reports—"Congressional Action Special Report—Organized Crime Control"—is its inclusion of several specific hypothetical examples, which aid the reader in understanding concretely the provisions of S. 30 and their value in specific law enforcement situations.

One such example clarifies the precise effect title VII of the act would have in barring untenable objections that evidence is "fruit of a poisoned tree" and in restricting defendants' access to irrelevant confidential Government files. The example reads as follows:

> Jones is a major interstate bookie. The FBI wants to get evidence not only against Jones, but against the New York office where he and other major bookies "lay off" their bets. Therefore, in 1970 and again in 1974, the FBI taps Jones' telephone under court order, for one day each time. All the agents hear is Mrs. Jones gossiping with a friend about allegations that a Mrs. Brown is carrying on an extramarital romance. Each time Mr. Jones' telephone is tapped, he is given notice of that fact afterward, as required by law, but he is not told the gossip that was overheard.
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> In 1977, Jones, driving while drunk, accidentally kills a pedestrian. Charged with manslaughter, he moves to suppress all evidence against him, claiming that it was derived from the wiretaps. The judge finds that the court orders for the wiretaps were defective. Under present law, Jones could inspect the transcripts for each wiretap.
>
> If Title VII of S. 30 is enacted, (1) motion to suppress evidence based on the 1970 wiretap is foreclosed completely, since a 1970 tap could not possibly have produced evidence of a car accident which did not occur until 7 years later; (2) the judge will examine the transcript of the 1974 tap in his chambers, will find it clearly irrelevant to the manslaughter charge, and will deny the motion to suppress. Thus, Mrs. Brown's reputation will have been protected from the disclosure of malicious gossip, and the court will have avoided needless delay of the manslaughter case.

Before the chamber published that example, authorities as prestigious as New York Mayor John Lindsay—Washington Post, Sunday, February 22, 1970, page D4, column 1; Tom Wicker, New York Times, Sunday, February 1, 1970, page 12E, column 5, the editors of the Washington Post, Friday, January 30, 1970, page A18, column 1, and the American Civil Liberties Union—statement placed in the CONGRESSIONAL RECORD at page 852 and following, of January 22, 1970, had made statements completely misinterpreting the provisions of title VII. They apparently had thought those provisions limited the fourth amendment's protection from unreasonable searches and seizures, by letting the police use illegal evidence after holding it for 5 years. Actually, a careful reading of those provisions shows they do not permit that, and the chamber has performed a real service for the public by demonstrating the title's real meaning in a concrete situation. While the affirmative need for title VII's enactment is more fully treated in the Senate Judiciary Committee report on S. 30—pages 62 to 69—the national chamber's hypothetical example is most useful in dispelling the exaggerated and inaccurate fears that title VII would impair individual rights.

Another aspect of the two reports is of special interest in light of the fascinating remarks on organized crime infiltration of race tracks and track concessions delivered last Wednesday by my distinguished colleague from Arizona (Mr. STEIGER) in the CONGRESSIONAL RECORD at page 5887 of March 4, 1970, the chamber reports explain and illustrate the provisions of title IX of S. 30, which would supply vital legal tools to do exactly what my colleague suggested be done when Mafia members have taken over racing or other business: "get them out." I congratulate the chamber on the public service they have performed by publishing these reports.

The chamber reports also remind the reader that control over S. 30, and responsibility for its future passage, now rest squarely in the House of Representatives and our Judiciary Committee. I hope that Members will discharge that responsibility by supporting the swift consideration, reporting, and passage of this much-needed legislation.

In order that Members and readers of the RECORD may see an example of the fine work of the chamber on organized crime, I would like to include pertinent portions of one of the recent reports in my remarks. The report follows:

[From Here's the Issue, Feb. 27, 1970]

ORGANIZED CRIME CONTROL

A major anti-crime bill is now pending in Congress

"The Organized Crime Control Act" (S. 30, McClellan, D-Ark.) was passed by the Senate, 73-1, on January 23.

* * * * *

In large measure, organized crime is flourishing because its members can be too seldom brought to justice.

The problem posed is extremely difficult. How do you close "legal loopholes" through which organized crime leaders are escaping without jeopardizing the rights of all people in our society?

That is the problem with which the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures, chaired by Sen. McClellan (D-Ark.) wrestled for almost a year.

The bill that was produced and passed by the Senate now incorporates the best recommendations of numerous organizations and specialists in law enforcement.

On the floor of the Senate, Senate Minority Leader Hugh Scott (R-Pa.) said:

The Constitution requires that we consider individual liberties as well as the common good of society. S. 30 strikes the appropriate balance. S. 30 would help clear America of organized crime.

But there are those who say that the bill goes too far. They talk of undermining individual liberties.

* * * * *

MAJOR PROVISIONS

Half of the 10 Titles in the bill deal with the knotty problems relating to the testimony and appearance of witnesses; one, with the use of wiretaps, one is designed to hit organized gambling; one deals with the infiltration of racketeers into legitimate businesses, and one, with the sentencing of habitual offenders. Title I permits the setting up of special grand juries and enlarges their powers.

New Powers for Special Grand Juries

Organized crime investigators and prosecutors have found that there is no means of gathering and using evidence in organized crime cases as effective as a grand jury, with its powers to summons witnesses and documentary evidence, to compel the giving of evidence in appropriate cases, and to return indictments.

The President's Crime Commission, accordingly, recommended that laws governing the operations of investigative grand juries be amended, so as to authorize impaneling investigative grand juries for extended periods of time. It would give these special grand juries substantial independence from the prosecutor and the court in organized crime cases, and empower them to file reports or presentments.

These recommendations have been incorporated in the bill.

The questions that have been raised concern largely the last point—the authority to issue reports on cases of governmental misconduct, on governmental misconduct, or on organized crime conditions.

Both the Administration and the Senate Judiciary Committee, however, have concluded that this power is constitutional, and a challenge to that conclusion was rejected on the Senate floor, 59-13.

Witnesses and testimony

Titles II through VI deal with witnesses and testimony.

Immunity. "Taking the Fifth Amendment" has passed into the language. Under present law, a witness who refuses to testify on the grounds that it might incriminate him can often be given immunity and then be required to testify. One trouble is that when that happens he can no longer be prosecuted—even if the Government has completely separate evidence of his complicity.

Under the proposed bill, the witness would still be protected from prosecution on the basis of his testimony, but he would not be given a complete "immunity bath." He could be tried on the basis of completely independent evidence.

Title II unifies and expands existing law dealing with the granting of immunity from self-incrimination to witnesses in legislative, administrative, and court proceedings. The granting of immunity in court and legislative proceedings is made subject to court review, and notice to the Attorney General is required prior to granting it in administrative proceedings.

Critics of Title II have pointed out that a witness who is compelled to testify under an immunity grant is exposed to public knowledge and disapproval of his acts. Anglo-Saxon law, however, has long held that each citizen owes a duty to society to testify in the aid of justice.

Recalcitrant Witnesses. Title III is designed to deal with the witness who could not be incriminated by his testimony—or who has been given immunity—and yet refuses to give evidence, perhaps out of a desire to shield his friends or criminal accomplices.

It authorizes that such a recalcitrant witness in grand jury or court proceedings be confined without bail until he complies with the order of the court to testify. When he testifies, he is promptly released.

Federal law already covers witnesses who flee from a State to avoid testifying in State criminal proceedings. This Title further extends that statute to those who flee to avoid giving testimony before State investigative commissions—such as happened in New Jersey recently.

In view of the major contribution to public knowledge of organized crime conditions which such commissions have made in several states, the readiness of organized crime suspects to operate and to travel interstate, and the difficulties that State borders sometime pose, this provision should substantially assist the effort against organized crime.

Perjury. Existing rules make it difficult to obtain convictions in perjury cases. They require two witnesses or corroboration, limit reliance on circumstantial evidence, and prevent juries from inferring that one of two contradictory statements is false.

Title IV creates a new perjury provision for court and grand jury proceedings, and is advocated by those who point out that even though testimony can be obtained from the threat of contempt proceedings or a grant of immunity, the authorities can obtain truthful testimony only if the law punishing perjury can be enforced effectively.

Some people charge that Title IV will make it too easy to obtain perjury convictions, but its supporters point out that the Title retains the requirement that the Government prove an intentional and material falsehood beyond a reasonable doubt—so the perjury proof requirements will be as difficult to meet as the requirements in other criminal cases.

How it would help

Here is a case illustration of how these new provisions would help in the battle against organized crime.

An undercover narcotics agent engages in a series of dealings with a large local wholesaler of heroin to get his confidence. Then he arranges to buy ¼ kilo of heroin from him for $6,000. The day before the sale is to occur, other agents follow the wholesaler to New York and back. They believe he is buying the dope from Mafia members there, but cannot prove it so they cannot arrest him with his suppliers and the heroin.

The next day, when the wholesaler and the undercover agent complete the sale, the agents seize the heroin and money and arrest the wholesaler.

The wholesaler can be convicted under present law, on the basis of the seized drug and the testimony of the undercover agent. But there is no way to get at the Mafia suppliers as long as the wholesaler claims the Fifth amendment.

Once S. 30 is enacted into law, the wholesaler can be called before a special grand jury and given immunity from use of his testimony against him. But the immunity will not prevent him from being convicted on the basis of the independent evidence—the seized drug and the agent's testimony.

If the wholesaler refuses to talk, he could be sent to jail for civil contempt until he would talk—perhaps for as long as three years. If he were to lie about his New York transaction, he might be convicted of perjury.

Thus, S. 30 will give him a strong incentive to tell the truth, and his truthful testimony will help lead to his New York suppliers and their conviction.

Witness Protection. Titles V and VI are designed to protect witnesses and to remove the chief incentive that the mob has in harming them.

The President's Crime Commission found that organized crime leaders employ violence against witnesses for two purposes: "to destroy the particular prosecution at hand and to deter others from cooperating with police agencies."

The U.S. Attorney General testified in 1965 that even after cases had been developed, it was necessary to forgo prosecution hundreds of times because key witnesses would not testify for fear of being murdered. Indeed, he testified, the Department of Justice lost more than 25 informants in this way between 1961 and 1965.

It was in this context, therefore, that the President's Crime Commission concluded:

> The Federal Government should establish residential facilities for the protection of witnesses desiring such assistance during the pendency of organized crime litigation.

After trial, the witness should be permitted to remain at the facility as long as he needs to be protected. Title V implements these recommendations, and has faced no significant opposition.

The primary purpose of Title VI is to remove the chief incentive the mob has in preventing witnesses from testifying, either through murder, assault, intimidation, bribes, or other factors. It may also be used by witnesses being held in protective custody to make their release feasible.

It would achieve this objective by expanding the defendant's existing right, on court order, to take depositions to preserve testimony of his own witnesses, and extending that right to the Government, subject to constitutional guarantees of counsel and cross-examination, where the taking of a deposition is in the interest of justice.

Obviously, a deposition serves a useful purpose if it preserves the testimony of a witness in a form which is admissible at trial—if for some reason his testimony becomes otherwise unavailable.

Frank S. Hogan, the highly respected district attorney of New York, for example, told the Subcommittee that under the deposition system, the "testimony of one Pete LaTempa who died on January 12, 1945, while in jail, would have been available in 1946 at the trial of Vito Genovese and four co-defendants for the crime of murder and would have thus precluded the direction of an acquittal by the Court. . . . If power to take depositions had been as broad as that which would be authorized in the public interest by the proposed amendment, the outcome of the Genovese case might have been different."

PROTECTION OF IRRELEVANT WIRETAPS

Title VII overrules a Supreme Court Decision, *Alderman v. United States, 394 U.S. 165 (1965)*. That case held that a Federal criminal defendant who claims that the evidence against him was derived indirectly from information shown to have been obtained by the government in violation of his rights must be allowed to examine all the illegally obtained information, even if it is obviously irrelevant to the prosecution and its disclosure will harm innocent persons and the public interest.

This requirement of automatic disclosure has permitted defendants, especially organized crime leaders which the government "bugged" from 1961 to 1965, unduly to delay and confuse their prosecutions with unlimited hearings and appeals of tenuous motions to suppress evidence.

It has, in addition, provided Mafia members with confidential information for which their only use is to bribe or threaten witnesses, destroy evidence, uncover secret agents, and otherwise ruin prosecutive efforts. And it has resulted in several massive public revelations of malicious and false private gossip that has harmed individual reputations.

Title VII replaces the existing flat rule with two provisions which assure a defendant's access to confidential files for which he has a legitimate use, but not to other files.

First, it forecloses such a claim entirely, where the violation of the defendant's rights, such as an illegal wiretap, took place more than five years before his crime. This provision is based on Justice Department experience that a tap cannot possibly lead to evidence of a crime not even committed until more than five years after the date of the alleged illegal surveillance.

For claims not foreclosed by the five-year period, the Title requires a judge to screen confidential government files, reveal them to the defendant only if they may be relevant and disclosure is in the interest of justice, and prevent public access to them if it is not in the interest of justice.

ATTACK ON SYNDICATED GAMBLING

Title VIII was initiated by the Nixon Administration and is designed to strike at organized gambling.

It makes it a Federal crime to operate a gambling business which (1) violates State law; (2) involves five or more persons, and (3) operates over 30 days or has gross revenue of $2,000 in one day.

It also makes it a Federal crime to obstruct enforcement of State law against such a business.

Non-profit, tax-exempt games of chance are exempted.

A commission is also set up to study national policy on gambling.

In his special message on organized crime, the President pointed out that the Administration had concluded that the major "thrust of its concerted anti-organized crime effort should be directed against gambling activities," because "gambling income is the lifeline of organized crime. If we can cut it or constrict it, we will be striking close to its heart."

Although most Americans may believe that gambling is the "least reprehensible of all the activities of organized crime," he noted, it provides "the bulk of the revenues that eventually go into usurious loans, bribes of police and local officials, 'campaign contributions' to politicians, the wholesale narcotics traffic, the infiltration of legitimate businesses, and to pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime."

The President also indicated that one purpose of the proposals is to help root out cases of bribery and corruption of local law enforcement officials. He said:

> For most large-scale illegal gambling enterprises to continue operations over any extended period of time, the cooperation of corrupt police or local officials is necessary. This bribery and corruption of Government closest to the people is a deprival of one of a citizen's most basic rights.

INFILTRATION OF LEGITIMATE BUSINESS

Here is an example of a problem:

A Mafia boss accepts all the shares in a juke box corporation in payment for an illegal gambling debt. Then he expands the number of cafes in which his machines are placed by having the cafe owners threatened and beaten. Soon, he dominates the music machine business in his city, has ruined his competitors, and raises the share of the machine income which he demands that the cafes pay him.

Under present law, the government may be able to obtain a criminal conviction, imprisonment and fine.

The trouble is that while the Mafia boss serves his prison term, other members of the syndicate run the business for him, and upon his release he resumes his brutal and monopolistic methods.

Title IX is designed not only to curb infiltration of legitimate business, but to provide better remedies when it happens.

The Title thus contains a three-fold standard: (1) making it unlawful for a person to use income from his "racketeering activity" to acquire an interest in or establish an enterprise engaged in interstate commerce; (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a pattern of "racketeering activity"; and (3) proscribing the operation of any enterprise engaged in interstate commerce through a pattern of "racketeering activity."

"Racketeering activity" is defined in terms of specific State and Federal statutes now characteristically violated by members of organized crime. The offenses include murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotic drugs, counterfeiting, embezzlement, fraud, and white slave traffic.

A fine of $25,000 or imprisonment for not more than 20 years is provided for violation.

In addition, provision is made for the criminal forfeiture of the convicted person's interest in the enterprise. District courts are authorized to prevent and restrain by civil process violations of the standards by, among other things, (1) the issuance of orders of divestment; (2) prohibitions of business activity; and (3) orders of dissolution or reorganizations.

Thus, in the illustration used above, a criminal prosecution of the Mafia boss could also result in forfeiture to the government of his interest in the business, or a civil proceeding that could result in an order that he divest himself of the business and refrain from re-entering that line directly or indirectly. In either case, the court could supervise the sale of the business to see that it wound up in clean hands. A legitimate industry could be returned to lawful operation in a free enterprise system.

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions.

Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee "sweetheart" contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts.

The American Bar Association has concluded:

"Organized crime . . . is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies, because its position does not rest on economic superiority."

Title IX provides the means not only to punish racketeers who abuse interstate commerce, but to remove their disruptive influence upon it and to prevent their re-entry.

SPECIAL OFFENDER SENTENCING

Title X is designed mainly to ensure that organized criminals and other convicts presenting special dangers to society can and do receive prison terms that are long enough to ensure that they do not promptly renew their criminal careers. Rackets prosecutors have long known from experience that syndicate leaders seldom face or receive long terms—a fact supported by statistical evidence.

The bill provides for increased sentencing (up to 30 years) for dangerous adult special offenders, defined to include (1) a three-time felony offender who was previously incarcerated; (2) an offender whose felony was a part of a pattern of criminal conduct which constituted a substantial source of his income and in which he manifested special skill or expertise; and (3) an offender whose felony offense was in furtherance of a conspiracy with three or more persons to engage in a pattern of criminal conduct in which he would occupy a management level position or employ bribery or force.

The concept of authorizing increased prison terms for special offenders has come to be widely accepted. Constitutional objections have been voiced to these standards and procedures for special sentencing, but definitions and procedural guarantees have been placed in the Title which are designed to prevent constitutional difficulties, and which are generally parallel to those proposed by the professional and official bodies that have endorsed the concept.

91st Congress } HOUSE OF REPRESENTATIVES { Report
2d Session }   { No. 91–1549

ORGANIZED CRIME CONTROL ACT OF 1970

September 30, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Rogers of Colorado, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, INDIVIDUAL, AND DISSENTING VIEWS

[To accompany S. 30]

The Committee on the Judiciary, to whom was referred the bill (S. 30) relating to the control of organized crime in the United States, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Organized Crime Control Act of 1970."

STATEMENT OF FINDINGS AND PURPOSE

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law

TITLE IX—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

This title creates a new chapter in title 18, entitled "Racketeer Influenced and Corrupt Organizations," which contains a threefold standard (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce; (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," and (3) proscribing the operation of any enterprise engaged in interstate commerce through a "pattern" or "racketeering activity."

"Racketeering activity" is defined in terms of specific State and Federal criminal statutes.

As amended by the committee, "pattern" is defined to require at least two "racketeering acts," one of which occurred after the effective date of the statute, and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior "racketeering act."

A fine of $25,000 or imprisonment for not more than 20 years is provided for a violation. In addition, provision is made for the criminal forfeiture of the convicted person's interest in the enterprise engaged in interstate commerce. The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured.

District courts are authorized to prevent and restrain by civil process violations of the above standard by, among other things, the issurance of (1) orders of divestment; (2) prohibitions of business activity, and (3) orders of dissolution or reorganization.

Provision is made for nationwide venue and service of process, the expedition of actions, civil investigative demands, and the use of court order electronic surveillance and its product.

TITLE X—DANGEROUS SPECIAL OFFENDER SENTENCING

Title X authorizes extended sentences of up to 25 years for dangerous adult special offenders defined to include (1) a three-time felony offender who has been previously incarcerated; (2) an offender whose felony offense was committed as a part of a pattern of criminal conduct, and (3) an offender whose felony offense was committed in furtherance of a conspiracy of three or more other persons to engage in a pattern of criminal conduct.

The imposition of the extended term based upon a charge by the prosecuting attorney and a hearing before the sentencing court following conviction. The title provides for the assistance of counsel, compulsory process and cross-examination of witnesses. Appellate review of the extended sentence is provided for both the Government and the defendant, but the Government must exercise the option to seek review at least 5 days before the expiration of the time for review by the defendant.

Title X also authorizes the Attorney General to establish in the Department of Justice a central repository for records of convictions.

91st Congress } HOUSE OF REPRESENTATIVES { Report
2d Session } { No. 91-1549

ORGANIZED CRIME CONTROL ACT OF 1970

September 30, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Rogers of Colorado, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, INDIVIDUAL, AND DISSENTING VIEWS

[To accompany S. 30]

The Committee on the Judiciary, to whom was referred the bill (S. 30) relating to the control of organized crime in the United States, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Organized Crime Control Act of 1970."

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The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law department or agency employee designated by the Attorney General or Deputy Attorney General to carry out the powers conferred upon the Attorney General under this chapter.

Section 1962 establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations.

Subsection (a) makes it unlawful to invest funds derived from a pattern of racketeering activity, as defined in section 1961 (1) and (5), or collection of unlawful debt as defined in section 1961 (6), in any enterprise engaged in interstate or foreign commerce. The funds must have been derived by the investing party from activity in which he participated as a principal. An exception has been provided for the purchase on the open market of less than 1 percent of a company's securities where there is no degree of control in law or in fact to the investor.

Subsection (b) prohibits acquisition or maintenance of an interprise through the proscribed pattern of racketeering activity or collection of unlawful debt. There is no 1 percent limitation here as in subsection (*a*) because (a) focuses on legitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the proscribed pattern of activity or collection of debt. Consequently, any acquisition meeting the test of subsection (b) is prohibited without exception.

Subsection (c) prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt. Again, the prohibition is without exception.

Subsection (d) makes conspiracy to violate (a), (b), or (c) equally subject to the sanctions of sections 1963 and 1964, below.

Section 1963 provides criminal penalties—including criminal forfeitures—for violation of section 1962. The maximum penalty authorized under subsection (a) is a $25,000 fine and imprisonment for 20 years. But, in addition, violations shall be punished by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations.

Subsection (b) provides for the entering of restraining orders and prohibitions and the requiring of performance bonds to prevent preconviction transfers of property to defeat the purposes of the new chapter.

Subsection (c) provides rules governing the forfeited property. In general, it incorporates by reference the long-tested customs law provisions. It adds a provision that those rights which are not exercisable or usable by the United States shall expire. The United States is required to dispose of property as promptly as is practical, making due provision for the rights of innocent persons.

Section 1964 provides civil remedies for the violation of section 1962, above.

Subsection (a) contains broad provisions to allow for reform of corrupted organizations. Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.

Subsection (b) allows courts to require performance bonds and to enter restraining orders ot prevent frustration of the aims of the chapter. See proposed section 1963(b) above. Actions are to be brought by the Attorney General, as defined in section 1961(10). The court is directed to expedite actions hereunder.

Subsection (c) provides for the recovery of treble damages by any person injured in his business or property by reason of the violation of section 1962.

Subsection (d) provides specifically for collateral estoppel between final judgments or decrees rendered in criminal proceedings brought by the United States under the chapter and subsequent civil actions instituted by the United States.

Section 1965 contains broad provisions regarding venue and process, which are modeled on present antitrust legislation.

Subsection (a) establishes venue for civil proceedings under the chapter wherever the defendant resides, is found, has an agent, or transacts his affairs, without regard to the amount in controversy.

Subsection (b) provides nationwide service of process on parties, if the ends of justice require it, in actions under section 1964.

Subsection (c) provides nationwide subpena power for witnesses in civil or criminal proceedings instituted under the chapter. A court order on good cause shown is required for issuance if the witness in a civil action resides in another district and at a place more than 100 miles from the court.

Subsection (d) provides that all other process in actions under the chapter may be served wherever the person resides, is found, has an agent, or transacts his affairs.

Section 1966 allows the Attorney General, as defined in section 1961(10), to obtain the maximum practical expedition of those cases of general public importance.

Section 1967, as amended, provides that ancillary proceedings and civil actions under the chapter may be open or closed to the public at the discretion of the courts.

Section 1968 provides for civil investigative demands as a civil counterpart of grand jury process. The provisions of this section are adapted from the Antitrust Civil Process Act, 76 Stat. 548, 15 U.S.C., 1311 et seq., with certain variations. A principal variation is that "person" is defined (in sec. 1961 (3)) to include natural persons. "Attorney General" also has a broader meaning than in antitrust law (see sec. 1961 (10) above).

Subsection (a) authorizes the Attorney General, in the course of a racketeering investigation and prior to the institution of any civil or criminal process, to serve a civil investigative demand upon any person or enterprise believed to have material relevant to such investigation. Unlike the comparable situation in the antitrust laws, the person served need not himself be under investigation before documents relevant to the investigation may be obtained from him.

Subsection (b) requires that the demand describe the nature of the conduct and the violation being investigated, fairly identify the documents being demanded, set an immediate or reasonable future date for compliance, and identify the custodian to whom the material is to be made available.

Subsection (c) specifies that the demand may not set forth requirements which would be unreasonable, or seek information which would privileged from disclosure, if contained in a subpena duces tecum before a grand jury.

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those who heretofore have escaped sanctions.

There is an old saying, "If passion drives let reason hold the reins."

I am free to confess that emotion and passion inspired the bill originally but reason must now control. The bill reflected originally public hysteria caused by the escalation of crime. Our committee I think put reason in the driver's seat and made the bill palatable and indeed worthy of your support.

We made some 50-odd changes, offered some 50-odd amendments to the Senate bill. This legislation manifests the diligence and the Judiciary Committee's desire to produce a fair bill.

Mr. Chairman, the purpose of S. 30, as amended, is to curb organized crime by strengthening the Federal criminal justice system. There has been considerable confusion over what this measure really does provide and what it may actually accomplish. As reported by the Committee on the Judiciary, the bill contains an amendment in the nature of a substitute. Although S. 30 embodies the same 11 titles in the measure which the Senate approved, each title has been reworked or amended to some degree. In addition, the bill contains two new titles: Title XI—providing for the regulation of explosives; and title XII—establishing a National Commission on Individual Rights. It may be helpful to the ensuing debate to summarize the main features of each of the titles of the bill, as reported.

TITLE I—SPECIAL GRAND JURIES

Title I provides for the impaneling of special or investigative grand juries in major population centers and in other areas designated by the Attorney General. As amended by the committee, these special panels would serve, as do regular grand juries, under the supervision of the Federal district courts. They would be authorized to sit for extended periods—up to 36 months—and to issue reports first, concerning misconduct involving organized criminal activity of appointed Government officials, and second, regarding organized crime conditions within the district. When such reports are critical of identified indviduals, the bill establishes procedures for notice, the opportunity to present evidence, to file an answer and to judicial review prior to publication.

TITLE II—WITNESS IMMUNITY

Title II contains a general Federal immunity statute that affords "use" immunity rather than "transaction" immunity when a witness before a court, grand jury, Federal agency, either House of Congress, or congressional committee or subcommittee, asserts his privilege against self-incrimination. This title would displace the privilege against self-incrimination by granting protection intended to be coextensive with the privilege; that is, protection against the use of compelled testimony directly or indirectly against the witness in a criminal proceeding.

TITLE III—RECALCITRANT WITNESSES

This title seeks to codify civil contempt practice with respect to recalcitrant witnesses in Federal grand jury and court proceedings. The title spells out the powers of the court summarily, without a jury, to coerce testimony by imprisonment. As amended by the committee, the maximum confinement authorized is 18 months, and the applicable standard of bail during an appeal of a contempt order is made consistent with the Federal Rules of Criminal Procedure.

Title III also applies Federal sanctions to witnesses who flee State process in order to avoid testifying before State criminal investigatory agencies.

TITLE IV—FALSE DECLARATIONS

Title IV establishes a new Federal false declaration standard applicable to grand jury and court proceedings. Its purpose is to facilitate Federal perjury prosecutions by permitting convictions based on irreconcilably inconsistent declarations under oath. In order to encourage truthful testimony, the title, as amended, permits recantation to be a bar to a false declaration prosecution in certain circumstances.

TITLE V—PROTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

As a further effort to secure and preserve essential prosecution testimony in an organized crime proceeding, title V authorizes the Attorney General to protect and maintain Federal and State organized crime witnesses and their families. It is provided that State witnesses may be protected on a reimbursable basis.

TITLE VI—DEPOSITIONS

Title VI authorizes the Government to preserve testimony by the use of a deposition in a criminal proceeding, a right which now exists only for the defendant under the Federal Rules of Criminal Procedure—rule 15. The Government's access to depositions is confined to organized crime cases, and as amended by the committee, the bill makes clear that such access shall not infringe the defendant's rights under the fifth amendment. It is also provided that the scope of examination and cross-examination shall be the same as at trial.

TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE

Title VII intends to limit disclosure of information illegally obtained by the government to defendants who seek to challenge the admissibility of evidence because it is either the primary or indirect product of such an illegal act. The title also prohibits any challenge to the admissibility of evidence based on its being the fruit of an unlawful governmental act, if such act occurred 5 years or more before the event sought to be proved. As amended by the committee, the application of title VII is limited to Federal judicial and administratve proceedings, and to electronic or mechanical surveillance which occurred prior to June 19, 1968, the date of enactment of the Federal wiretapping and electronic surveillance law—chapter 119, title 18, United States Code.

TITLE VIII—SYNDICATED GAMBLING

This title contains five parts:

Part A contains a congressional finding that illegal gambling involves the widespread use of, and has an effect on, interstate commerce and its facilities.

Parts B and C establish two new substantive Federal offenses. The first proscribes conspiracies to obstruct the enforcement of State law to facilitate an illegal gambling business. An illegal gambling business is defined as one which is conducted in violation of State or local law, which involves 5 or more persons who conduct, finance, manage or own all or part of the enterprise and which is in substantially continuous operation for over 30 days or has a gross revenue in excess of $2,000 in a single day. A fine of up to $20,000 or imprisonment for not more than 5 years, or both, is provided. The second offense makes it unlawful to engage in the operation of the illegal gambling business itself, defined as above. Any property used in violation of these provisions is made subject to forfeiture and a fine of $20,000 or imprisonment for not more than 5 years, or both, is authorized.

Part D establishes, effective in 2 years, a presidential commission to conduct a comprehensive review of Federal and State gambling policies and their alternatives.

Part E expressly authorizes court order electronic surveillance to enforce the provisions of parts B and C.

TITLE IX—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Title IX is designed to inhibit the infiltration of legitimate business by organized crime. In addition to creating new Federal offenses punishable by traditional criminal sanctions of a fine of not more than $25,000 or a prison term up to 20 years, or both, title IX also creates civil remedies modeled on those found in the antitrust field. These include orders of divestment, prohibition against business activity and orders of dissolution or reorganization, and treble damage suits on the part of private parties who are injured. The title also authorizes forfeiture of any interest which has been attained in violation of the criminal provision.

The title prohibits the investment of funds derived from a pattern of racketeering activity or from the collection of an unlawful debt, where the investor participated as a principal, in a business engaged in interstate commerce. It also proscribes the acquisition, maintenance or control of any interest in a business engaged in commerce through a pattern of racketeering activity or the collection of unlawful debts. The conduct of the affairs of a business by a person acting in a managerial capacity, through racketeering activity is also proscribed. Conspiracies to violate any of the provisions of the title also are made punishable.

Racketeering activity is defined in terms of specific State and Federal criminal statutes.

As amended by the committee, pattern is defined to require at least two racketeering acts, one of which occurred after the effective date of the statute, and the last of which occurred within 10 years—excluding any period of imprisonment—after the commission of a prior racketeering act.

Provision is made for nationwide venue and service of process, the expedition of actions, civil investigative demands, and the use of court order electronic surveillance and its product.

TITLE X—DANGEROUS SPECIAL OFFENDER SENTENCING

Title X authorizes extended sentences of up to 25 years for dangerous adult special offenders defined to include first, a three-time felony offender who has been previously incarcerated; second, an offender whose felony offense was committed as part of a pattern of criminal conduct, and third, an offender whose felony offense was committed in furtherance of a conspiracy of three or more other persons to engage in a pattern of criminal conduct.

The imposition of the extended term must be based upon a charge by the prosecuting attorney and a hearing before the sentencing court following conviction. The title provides for the assistance of counsel, compulsory process and cross-examination of witnesses. Appellate review of the extended sentence is provided for both the Government and the defendant, but the Government must exercise the option to seek review at least 5 days before the expiration of the time for review by the defendant. Further, the bill permits an appeal by the Government to result in an increase in a dangerous special offender sentence or a reversal of the trial court's finding that the defendant is not a dangerous special offender.

Title X also authorizes the Attorney General to establish in the Department of Justice a central repository for records of convictions. Records maintained in this respository are made admissible in evidence in the Federal courts.

TITLE XI—REGULATION OF EXPLOSIVES

This title, added by the committee, establishes Federal controls over the interstate and foreign commerce of explosives and is designed to assist the States to more effectively regulate the sale, transfer and other disposition of explosives within their borders. The title establishes a system of Federal licenses and permits; licenses are required of all explosives manufacturers, importers, and dealers; and permits are required of all users who depend on interstate commerce to obtain explosives. The title prohibits the distribution of explosives to persons under 21 years of age, drug addicts, mental defectives, fugitives from justice, and persons indicted for or convicted of certain crimes. Licensing authority is vested in the Secretary of the Treasury who is also authorized to regulate the storage of explosives. The title also makes it a Federal offense to falsify records, or make false statements to obtain explosives, to sell explosives in violation of State law and to traffic in stolen explosives.

In addition to the Federal regulatory scheme, title XI strengthens the Federal criminal law with respect to the illegal use, transportation or possession of explosives. Under this part of the title the definition of explosives is broadened to include incendiary devices such as "Molotov cocktails." In addition to increasing present penalties for the illegal use of explosives, title XI amends Federal law to cover malicious damage or destruction by explosives to Federal premises and other Federal property as well as to the premises and property of institutions or organizations receiving Federal financial assistance such as universities, hospitals, and police stations.

The title also specifically proscribes malicious damage or destruction by explosives of real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Existing penalties are increased and the death penalty is extended to new offenses added by the title. The new criminal offenses become effective upon enactment of the legislation; the licensing provisions become effective in 120 days.

TITLE XI—NATIONAL COMMISSION ON INDIVIDUAL RIGHTS

This title, added by the committee, establishes, effective January 1, 1972, a National Commission on Individual Rights which is to conduct a comprehensive study and review of Federal laws and practices relating to special grand juries and to special offender sentencing authorized under this act, wiretapping and electronic surveillance, bail reform and preventive detention, no-knock search warrants, and the accumulation of data on individuals by Federal agencies as authorized by law or acquired by executive action.

The Commission is authorized to make interim reports as it deems advisable and shall make its final report to the President and the Congress within 6 years of its establishment.

CONCLUSION

Mr. Chairman, measures such as S. 30 may well contribute to improving the capacity of the criminal justice system to respond to the challenge of a burgeoning crime rate. But no single anticrime bill, S. 30 or any other, will furnish the panacea to the crime problem. Heightened prosecutorial powers, enhanced criminal sanctions and longer periods of incarceration deal only with the symptoms of the basic problem.

As long as prisons resemble human warehouses and fail to provide adequate programs of rehabilitation, as long as the rate of criminal recidivism increases and the underlying causes go unattended, then effective crime control and effective crime prevention must await.

The CHAIRMAN. The gentleman from New York (Mr. CELLER) has consumed 27 minutes.

The Chair now recognizes the gentleman from Ohio (Mr. MCCULLOCH).

Mr. McCULLOCH. Mr. Chairman, I yield myself such time as I may use.

Mr. Chairman, I rise in support of S. 30. The bill as it passed the Senate consisted of 10 titles aimed primarily at the problems created by organized crime. The 11th and last title contained a standard separability clause.

The Committee on the Judiciary recommends that S. 30 pass with an amendment in the nature of a substitute. The substitute incorporates many changes which were the product of months of serious painstaking study. The 13 days of hearings and the 7 days of executive meetings, some around the clock, do not begin to tell the story of the thought and deliberation that went into the committee substitute.

S. 30—as reported—is a better bill. Provisions have been made workable. Constitutional rights have been protected. Measures have been clarified. But beyond that, the committee fashioned a new title to combat the recent rash of bombings. The new title is basically a combination of two bills—H.R. 16699 and H.R. 18573—which I introduced and which were cosponsored by numerous colleagues. But even with such provisions, S. 30 is no panacea. We who advocate this legislation do not claim that it is solution to all our crime problems. In fact, in my opinion, this bill is not the ultimate solution even to the problems posed by organized crime and by bombings. But this bill will mark the beginning of a vigorous attack on those problems, a day, which all may well be proud.

The Committee on the Judiciary built upon the work of the other body. The first 10 titles still retain their basic thrust. The first five titles are designed to accomplish one simple purpose: to get facts. Title I establishes special grand juries which may exercise more independence in fulfilling their duties and may sit for a period of time up to 36 months. In attempting to find out the facts, the grand jury may summon witnesses and compel them to talk by granting them immunity against the use of their testimony against them—Title II. If they refuse to talk, they may be held in civil contempt—Title III. If they talk but do not speak the truth, they may be tried for perjury. Title IV eliminates medieval rules of evidence which hobbled prosecution for this crime. And if the witness talks and places his life in jeopardy, title V authorizes the Government to protect him or even to relocate him.

Titles VI and VII facilitates the actual trial of organized criminals. Title VI allows the Government to take a deposition of a Government witness and use it at trial if the witness is for certain reasons not available. This not only protects the Government's case but the witness as well. The organized criminals have no motive to kill or kidnap a witness if the damning testimony is recorded and admissible.

Title VII precludes litigation concerning claims of illegal electronic surveillance by the Government which could not have possibly produced evidence for the prosecution.

Titles VIII and IX create substantive criminal offenses related to organized crime. Title VIII makes large-scale gambling operations in violation of State law a Federal crime. It also outlaws bribery of State and local officials in connection with such gambling enterprises. Title IX makes it unlawful to engage in a pattern of racketeering activity as a means of acquiring, maintaining, or conducting a business and creates civil and criminal remedies such as are found in antitrust law.

Title X establishes a postconviction presentencing procedure for determining whether the defendant is a habitual, professional, or organized criminal. Such an offender may then be accorded an extended sentence.

Although the Committee on the Judiciary made about 80 changes in this legislation in fashioning its substitute, there are three major points that merit discussion.

First: The Senate version allowed special grand juries to make reports concerning the noncriminal misconduct, malfeasance, or misfeasance in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action. The committee limited the application of the report power to appointed public officers and employees. The limitation has two purposes. The first is to keep the special grand jury from "playing politics." Some members of the committee feared that a special grand jury might be tempted to abuse its power by trying to influence the outcome of an election.

The second purpose of the limitation is to protect further this grant of power to the special grand jury from attack on grounds that it violates the due process clause. Some have criticized this provision in the Senate bill as granting the special grand jury what is in effect the power to indict without according the identified individual the opportunity for vindication. The phrase—as the basis for a recommendation of removal or disciplinary action—did not make sense when applied to instances of elected officials such as mayors or Governors. To whom would the recommendation be made? The people? Who had the authority to remove or discipline such an official? If no such power to remove or discipline existed, was the special grand jury yet authorized to issue the report?

The answers to such questions become evident when the reporting power is limited to appointed officers and employees. Then the report may be viewed as a recommendation to the appointing agency to remove or to discipline. The identified individual thus has a further recourse. He may present his case anew to the appointing agency. He will have an opportunity to vindicate his position. The analogy to an indictment without a trial is no longer valid.

Second: Title VII is intended to diminish litigation over the sources of evidence. In *Alderman* v. *United States*, 394 U.S. 165 (1968), the Supreme Court held that a defendant challenging the admissibility of evidence who demonstrates the illegality of governmental electronic surveillance and that he has standing to assert the illegality of such surveillance is thus entitled to disclosure of the contents of such surveillance for purposes of litigating the challenge to the evidence. Litigation results whether or not there is any arguable connection between the Government's illegality and the case being made against the defendant.

During the hearings it became evident that the problem presented was primarily one resulting from cases of electronic surveillance arising in the absence of guidelines from either the Supreme Court or the Congress. Those guidelines were handed down by the Supreme Court in *Katz* v. *United States*, 389 U.S. 347 (1967) and by the Congress on June 19, 1968, when title III of the Omnibus Crime Control and Safe Streets Act became law. In other words, the bulk of the problem concerned illegal electronic surveillance occurring prior to June 19, 1968.

However, testimony was also received that the Alderman decision could not be changed by statute since it was based on an interpretation of the fourth amendment. In the situation alluded to before, Alderman would require disclosure to the defendant so that the defendant could make a claim that the evidence offered must constitutionally be excluded under *Mapp* v. *Ohio*, 367 U.S. 343 (1961). But if the fourth amendment does not require that Mapp itself be applied retrospectively, *Linkletter* v. *Walker*, 381 U.S. 618 (1965); it would seem ironic that a rule ancillary to Mapp could merit superior constitutional rank.

If the Government could be relieved from the burden of its irrelevant mistakes made at a time when appropriate guidelines were not yet in existence and if Alderman were not applied retrospectively, no violation would be worked upon the fourth amendment. Thus the committee found it possible to limit the mischief of Alderman without having to decide whether it was constitutionally based.

The question remained as to what date was an appropriate one for marking the prospective application of Alderman. Recent decisions of the Supreme Court have increasingly allowed law enforcement officials to rely on practices until proscribed, *Jenkins* v. *Delaware*, 395 U.S. 213, 218, n. 7 (1969). Since Katz brought nontrespassory electronic surveillance under the fourth amendment on December 18, 1967, that date seems most appropriate. But the choice of date in a case such as this is not a matter of constitutional compulsion but rather one of reasonableness, as the Court said in Jenkins. Hence, Congress in making the choice of date could reasonably pick the date on which the legislation guidelines were enacted, provided that such date was not later than the date of enactment of S. 30. Such later date would be constitutionally forbidden by Mapp.

In summary, if the Alderman rule is constitutionally based, then the committee's amendment has saved the provision and remedied most of the problem.

Third: Title XI is basically a combination of two bills which I introduced. H.R. 18573 establishes a regulatory scheme for the importation, manufacture, distribution, and storage of explosive materials which in many respects parallels the Gun Control Act of 1968. H.R. 16699 provides criminal penalties, including the death penalty, for the illegal use of explosives. The committee adopted H.R. 18573 but authorized the Treasury Department, not the Interior Department, to administer the title because of its experience with the Gun Control Act of 1968. The committee also adopted H.R. 16699 with the exception of one minor criminal provision. However, the committee extended the provision protecting interstate and foreign commerce from the malicious use of explosives to the full extent of our constitutional power. It also adopted a provision protecting institutions and organizations receiving Federal financial assistance from the malicious use of explosives. Lastly, the committee included the criminal provisions within the list of offenses for which electronic surveillance may be authorized by court order.

However, the combining of these two bills under the umbrella of title XI produced a problem. Had H.R. 16699 been enacted separately, it would have followed as a matter of course—without any express provision—that the Federal Bureau of Investigation would have had the authority to investigate any potential violations of law.

But when the regulatory measure which authorized the Secretary of the Treasury to administer the chapter containing the provisions normally within the investigatory authority of the FBI was combined with the criminal measure which was silent regarding the authority of the FBI, some questions arose as to whether the FBI had been displaced. To eliminate such a negative implication, it was written that the FBI—together with the Secretary—may investigate the criminal provisions. Why the phrase "together with the Secretary"? Because the Treasury Department has authority under the Gun Control Act of 1968 and under this legislation to investigate many explosions which may have resulted from a violation which the FBI is now given authority to investigate.

Thus the committee intended to grant the Treasury Department and the FBI the investigatory authority each would have had if H.R. 18573 and H.R. 16699 had been separately enacted.

The next question concerns what increase in authority has been given to the FBI through the provision making it criminal to bomb an institution or organization receiving Federal financial assistance. The FBI may presently investigate potential violations of section 245 of title 18, United States Code. Section 245(b) says:

> Whoever * * * by force or threat of force willfully injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person because he is or has been * * * participating in or enjoying the benefits of any program or activity receiving Federal financial assistance.

It would seem to me that the FBI could invoke either section 245(b) or proposed title XI to justify investigating a campus bombing. The difference between the two provisions would be seen at trial rather than during the investigation. At trial, title XI would relieve the Government of the burden of proving that the purpose of the bombing was to interfere with the enjoyment of a federally aided program.

Finally, no action taken by the committee was intended to change the method of operation of the FBI. The FBI has generally cooperated with local authorities in the past, and it is expected that they will continue to do so. Pragmatically, it is difficult to imagine how the FBI could otherwise proceed.

I urge the adoption of this legislation.

Mr. Chairman, I ask unanimous consent to revise and extend my remarks on the proposed legislation which is some of the most important anticriminal legislation that has been offered in my lifetime in the war on criminal activities.

The CHAIRMAN. Is there objection to the request of the gentleman from Ohio?

There was no objection.

Mr. CELLER. Mr. Chairman, I yield such time as he may consume to the gentleman from New Jersey (Mr. RODINO).

Mr. RODINO. Mr. Chairman, I rise to express my support of S. 30, the Organized Crime Control Act of 1970, as amended by the House Judiciary Committee.

This complex measure was considered by the Senate for over a year, and our committee gave it intensive study resulting, in my judgment, in improvements to some of the Senate-passed provisions that might raise constitutional challenges. In addition, we added two new substantive sections. The first deals with the relatively recent but extremely grave problem of bombing incidents that have plagued the Nation. The second would establish a commission charged with the specific responsibility of assessing the impact of the provisions of this and other acts on the individual rights of our citizens.

S. 30 stems from efforts to implement recommendations of the 1967 report of President Johnson's Commission on Law Enforcement and the Administration of Justice. The Commission's Task Force on Organized Crime succinctly described the extent of the problem in its statement:

> Organized crime exists by virtue of the power it purchases with its money. The millions of dollars it can invest in narcotics or use of layoff money give it power over the lives of thousands of people and over the quality of life in whole neighborhoods. The millions of dollars it can throw into the legitimate economic system give it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business.

In fact, as the Task Force report concludes:

> The purpose of organized crime is not competition with visible, legal government but nullification of it.

Many of the provisions of S. 30 are directly designed to carry out the Commission's recommendations, and I would like to call particular attention to these.

The Commission recommended that at least one investigative grand jury be impaneled annually in each jurisdiction that has major organized crime activity, and in title I of S. 30 provision is made for special grand juries to sit in major population centers or in other areas designated by the Attorney General. The bill also provides authority for such grand juries to issue reports, as recommended by the Commission.

The bill provides for general immunity of witnesses and protective facilities for crime witnesses and their families, as suggested in the Commission's report. It also carries out another Commission recommendation by authorizing extended sentences of up to 25 years for dangerous adult special offenders. Criteria to define such offenders are included in the bill, and legal safeguards and appellate review are provided for in such cases of extended sentences.

The bill also contains vital provisions to bring major illegal gambling operations within Federal jurisdiction and make it a crime to use income from organized crime or racketeering activity to acquire or establish a legal interstate business. In addition, it clarifies the admissability of evidence obtained from electronic surveillance in Federal judicial and administrative proceedings.

Mr. Chairman, I would like to stress particularly the two new titles to S. 30 which were added by our House Judiciary Committee.

Title XI, the regulation of explosives, is designed to help prevent the shocking and tragic bombing incidents that have been taking place across the country. It is patterned after the Gun Control Act of 1968 and would establish effective Federal controls over interstate and foreign commerce in explosives. It sets up a system of Federal licenses and recordkeeping for dealers in explosives and requires permits of all users obtaining explosives in interstate commerce. Distribution of explosives to drug addicts, mental defectives, fugitives, persons indicted for or convicted of certain crimes, and to persons under 21 years of age, is prohibited. It increases penalties for illegal use of explosives and expands present law to cover damage by bombings of Federal property as well as property of institutions or organizations receiving Federal financial assistance.

The second title added to S. 30 by the committee would establish, effective in 2 years, a National Commission on Individual Rights to conduct a comprehensive review of Federal laws and practices under this bill and other Federal laws to assess the impact on the rights of our citizens.

Mr. Chairman, as a member of the Judiciary Committee I have been concerned and deeply involved for years in the development of anticrime legislation, and I have long been aware of the desperate need for a national strategy to combat organized crime.

The Senate-passed version of S. 30 has been improved by our committee, including some amendments suggested by the American Bar Association. However, I still have serious reservations about some of the principles newly established in the bill, and I am glad that we have authorised a National Commission on Individual Rights to study the effects of the provisions of S. 30 and other major anticrime measures.

Mr. Chairman, organized crime affects the lives of millions of Americans, yet operates outside the control of the American people and of our governments. Drastic methods to combat it are essential, and we must develop law enforcement measures at least as efficient as those of organized crime. With S. 30 we will provide not a panacea to rid the Nation of organized crime but the basis for an effective national program and generate a truly full-scale commitment to destroy the insidious power of organized crime groups. So while I have serious questions about some provisions of S. 30, I support it and urge its approval. It is an essential measure in the effort to eradicate the dreadful disease of organized crime that now afflicts the Nation.

Mr. CELLER. Mr. Chairman, I yield such time as he may consume to the gentleman from Rhode Island (Mr. ST GERMAIN).

Mr. ST GERMAIN. Mr. Chairman, I rise in support of S. 30, the Organized Crime Control Act of 1970. The strong measures contained in this legislation are aimed at ridding our society of the highly profitable business of organized crime, and they are long overdue. Organized crime has been financially bleeding this country with increasing efficiency over a period of years. An estimate reported by the New York Times early this year, indicated that the rackets gross more than $30 billion, with net profits of between $7 and $10 billion. This is a conservative figure—a minimum estimate. Chairman DANTE FASCELL of the Government Operations Subcommittee on Legal and Monetary Affairs, of which I am a member, estimated the gross revenue of organized crime in this country at $60 billion. Our subcommittee, as you know, has oversight authority over the Federal efforts against organized crime. Time magazine reported last year that profits from the rackets are—and I quote—"as big as United States Steel, the American Telephone & Telegraph Co., General Motors, Standard Oil of New Jersey, General Electric, Ford Motor Co., IBM, Chrysler, and RCA put together"—and most of this, of course is untaxed.

Gambling is generally thought to be the most profitable of the illegal goods and services provided by the rackets and the syndicates. The President's Crime Commission reported in 1967 that enforcement officials believe that illegal betting on horse races, lotteries, and sporting events totals about $20 billion, with a net profit of $6 to $7 billion a year. If gambling is the most profitable of the rackets—and some believe loan sharking may be about equal with it—it is not the most lethal. The profits from gambling and usurious loans go into financing the deadly narcotics trade, and the profits here at the importing and wholesaling ends are as astronomical as is the cost paid for this traffic by society—in terms of human lives and the street crime motivated by the addicts' need for money to buy drugs.

Contrary to the popular view, organized crime does not confine its activities to the underworld. In his recent book, "Theft of the Nation," Prof. Donald Creasey wrote that the greatest danger from organized crime lies not in its provision of illegal goods and services, but in its penetration of the country's legitimate institutions. In his words:

> The danger of organized crime arises because the vast profits acquired from the sale of illicit goods and services are being invested in licit enterprises, in both the economic sphere and the political sphere. It is when criminal syndicates start to undermine basic economic and political traditions and institutions that the real trouble begins. And the real trouble has begun in the United States.

For example, I noted earlier that most of organized crime's profits are untaxed, but there are considerable overhead expenses. One of the most ominous statistics turned up by the President's

Crime Commission in their surveys was the estimated $2 billion paid out each year by organized crime to public officials in and out of the criminal justice system to buy immunity from the law. Further, from fake bankruptcy suits to theft of Wall Street securities to "partnership" in small and large manufacturing companies, the syndicates are well represented in business and industries, alphabetically from automobile agencies to vending machines, in which organized crime is active, and indicated that this was only a partial list.

While general counsel for Senator JOHN MCCLELLAN's Government Operations Subcommittee on Investigations, Robert Kennedy—a man not given to scare tactics—concluded that, and I quote from "The Enemy Within," "If we do not on a national scale attack organized criminals, with weapons and techniques as effective as their own, they will destroy us." That was in 1960. In 1967, reporting to President Johnson and the country, the President's Crime Commission concluded: "Efforts to curb the growth of organized crime in America have not been successful." In words reminiscent of the late Senator's, they reported:

> Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups.

This "full-scale commitment," however, is not simply a question of where there's a will, there's a way. In the words, again, of the President's Crime Commission:

> From a legal standpoint, organized crime continues to grow because of defects in the evidence-gathering process. Under present procedures, too few witnesses have been produced to prove the link between criminal group members and the illicit activities they sponsor.

Law enforcement officials know who the racket leaders are, and they know the organizational hierarchy of the different "families" of organized crime. This information, in fact, is freely available to the public: the most recent organization charts of the underworld are published in the Senate hearings on S. 30, pages 124 to 128. However, under current laws and procedures, the men at the top are virtually untouchable because they seldom commit crimes for which they can be successfully prosecuted. Further, they are buffered from the law by layers of subordinates and flunkies to the point where the numbers runners and narcotics pushers frequently don't know for whom they're really working, and those who do know also know what happens to "informers." The brutality recorded in "The Godfather" pales in comparison with some stories in the police files.

The major purpose of the legislation under consideration today is to provide the criminal justice system with the necessary legal tools to get at organized crime. Titles I through VII are aimed at strengthening the evidence gathering process and insuring that the evidence will then be available and admissible at trial. Briefly, title I increases the powers and independence of Federal grand juries investigating organized crime cases; title II consolidates and amends general immunity statutes with the purpose of encouraging those implicated in organized crime cases to testify. Title III increases the penalties available for witnesses who refuse to testify, and title IV would make perjury cases easier to prosecute, in accordance with recommendations of the President's Crime Commission. Title V provides for protected facilities for housing Government witnesses; title VI provides for the taking of pretrial depositions in certain cases; and title VII is aimed at restricting within reason litigation concerning sources of evidence.

Titles VII and IX would create two new substantive laws aimed at controlling organized crime activity. Title VIII, Syndicated Gambling, would make large-scale gambling a Federal offense. Title IX, Racketeer Influenced and Corrupt Organizations, is aimed at keeping organized crime out of legitimate businesses through the use of both criminal and civil penalties. Title X provides for 25-year sentences for certain categories of convicted special dangerous offenders, including those with proven organized crime connections.

The House version of S. 30 contains a new title XI, Regulation of Explosives, which is an antibombing rather than an antiorganized crime law. This title was added by the House Judiciary Committee in a bipartisan effort to increase the controls on the sale of explosives, and the penalties for their use. In addition to tightening an earlier Federal antibombing law, title XI extends Federal jurisdiction to bombings on campuses receiving Federal financial assistance, allowing the use of wiretapping in such cases and, of course, bringing in the FBI to assist State and local authorities in investigations. The need for immediate passage of strong antibombing legislation is tragically apparent from statistics released this summer by the Treasury Department. During the 15-month period of January 1, 1969 to April 15, 1970, there were 4,330 bombings in the United States, 1,475 attempted bombings, and 35,129 bomb threats. Forty-three people were killed and 384 were injured, many of them very seriously. Property damage during the period was estimated at $21,800,000. Only 36 percent of the bombing cases were solved, and, of these, 56 percent occurred in connection with campus disturbances.

I urge that S. 30 be enacted into law without further delay. Hopefully, a major effect of this legislation will be to deter both the cold-blooded businessmen of crime and the hot-headed anarchists from further activity.

Thank you.

Mr. McCULLOCH. Mr. Chairman, I should now like to say what I should have said, but did not say, when I was recognized before. I have been on the Committee on the Judiciary of the U.S. House of Representatives for well over 20 years and I have watched able staff members come and go, but never have I seen staff members who were in charge of the work on such important legislation who worked more diligently and who worked longer hours and devoted holiday time to getting in shape such important legislation, and I want to compliment them for the work they have done in their assignment.

Mr. Chairman, I now yield such time as he may consume to the gentleman from Virginia (Mr. Poff).

Mr. POFF. Mr. Chairman, the committee amendment to S. 30 measurably improves upon the original version of the organized Crime Control Act. Most of the changes recommended by the American Bar Association and many of those urged by the Association of the Bar of the City of New York have been adopted. The total result is a cleaner, stronger, fairer and more effective piece of legislation.

The bill contains 13 titles. These can be classified in 5 operative categories—evidence, gambling, racketeer organizations, special offender sentencing, and explosives.

The evidence category includes the first seven titles of the bill. If organized criminals are to be discovered, apprehended, charged and convicted, the Federal system of gathering and utilizing evidence must be strengthened. That is the purpose of titles I through VII.

A continuing thread of relevance connects each title with each of the other six. Title I authorizes special grand juries, citizen-oriented, to sit in major population centers to investigate, to indict, and to report upon organized criminal activity in the District and those in Government who are involved.

Title II makes it possible to compel witnesses before the grand juries or elsewhere to testify under a guarantee that neither their testimony nor the fruits of their testimony will be used to prosecute them.

Title III recognizes that, even under an immunity guarantee. Some witnesses may refuse to testify and therefore codifies the law whereby the court can coerce testimony under pain of imprisonment for contempt.

Title IV provides for the case of the witness who testifies but testifies falsely, as sometimes becomes apparent by his contradicting his own previous testimony.

Title V recognizes that prosecution witnesses and members of their families sometimes never live to testify and accordingly authorizes the Government to furnish special sanctuary living quarters.

Title VI is further recognition of the intimidation and violence visited upon prosecution witnesses by those engaged in organized criminal activities. It authorizes the Government to take depositions in advance of trial, not only to preserve testimony but to preserve life and limb.

And finally, title VII insures that once the evidence is lawfully discovered and assembled, it can be used at trial without the time-consuming frustration of frivolous and dilatory challenge to its legality.

Of the seven titles in the evidence category, only two, titles I and VII, are likely to provoke much debate.

The gambling category is found in title VIII. Syndicated gambling is the mob's principal source of income, estimated at $7 billion a year. The interstate gambling enterprise could not function without the connivance and corruption of State and local officials in the obstruction of State laws. Title VIII makes this conspiracy a Federal crime.

The racketeer organizations category in title IX is related to the gambling category. The money which the syndicate uses to infiltrate legitimate business enterprises comes largely from gambling receipts. Whether the technique of infiltration is intimidation and violence or simply public purchase, the consequence of mob ownership of business concerns are always evil. Business competitors suffer unfair competition. Workers are the victims of sweetheart labor contracts. And consumers are the victims of inferior products and services, price-fixing and most of the other predatory practices of monopolies. Title IX mobilizes both the criminal and civil mechanisms of the Sherman Act and other antitrust statutes against the barons of organized crime.

The category of special offender sentencing is found in title X. Title X is essentially the same as the amendment I offered to the Drug Control Act 2 weeks ago.

As the name of title X implies, it fixes special rules and special penalties for sentencing special offenders. It does not create a new crime. It does not apply to a juvenile or to the average occasional offender. It applies only to the most dangerous, persistent, hard-core criminals, those who fall in any of three groups—the organized crime offender, the professional criminal—who may or may not be a member of an organized mob—and the habitual criminal—who may be neither a professional nor a mobster.

Even the hard-core criminal is not subject to the special sentencing provisions of title X until he has first been convicted of a felony by a jury of his peers. Then, in the absence of the jury, the judge proceeds, just as he does under present law, to determine whether there are any mitigating or aggravating circumstances which he should consider in fixing the sentence. Title X gives the convicted defendant an adversary hearing with notice, the right to counsel, the right of compulsory process, the right of cross-examination of Government witnesses and the right to access to the presentence report. If the judge finds that the defendant is a hard-core repeat offender, this becomes an aggravating circumstance which authorizes the judge, if he further finds that he poses a danger to society, to impose a sentence up to 25 years.

Thereafter, title X gives the convicted defendant for the first time in Federal criminal law, the right to obtain an appellate court review of the propriety of the sentence imposed. Although the Government is given a similar right, there can be no increase in the sentence on the defendant's appeal alone.

The American Bar Association endorses title X as amended. The concept also has the endorsement of President Johnson's Crime Commission, the American Law Institute, the National Council on Crime and Delinquency and a host of legal scholars and penologists.

The fifth operative category concerning explosives found in title XI, is not restricted to organized crime. It is prompted by the national emergency of criminal bombings brought into dramatic focus by the recent tragedy at the University of Wisconsin. In order to assist the States in the enforcement of their laws on explosives, title XI establishes a Federal system of Federal regulation and licensing of the interstate movement of explosives. It also writes new Federal penalties for the use of explosives and incendiary devices to destroy property used in interstate commerce and property under the ownership or control of the Federal Government, including the property of institutions and organizations receiving Federal assistance.

This is a long bill, a complicated bill, a bill of criminal law reform and innovation. But it has been carefully and laboriously tested in the laboratory of public hearings and committee debate and comes to the calendar with only three votes against it. We must not shrink from it because it is new and different. Rather, because the problem is new and different, we must resist the temptation to be content with the old and customary.

Under unanimous consent granted in the House, I quote the following letter:

AMERICAN BAR ASSOCIATION,
September 11, 1970.

The Honorable EMANUEL CELLER,
Chairman, Committee on the Judiciary,
Rayburn House Office Building.

DEAR CHAIRMAN CELLER: During the testimony, some questioning occurred regarding the Model Act on Perjury, especially as to a comparison between it and Title IV on the language and effect thereof regarding false and contradictory declarations; also concerning the requirement (or lack thereof) of the element of materiality. Likewise we were requested to supply for the record information as to adoption of the Model Act on Perjury in the states. (Typewritten transcript pp. 499–504).

With further reference to the element of materiality, the prefatory note to the Model Act on Perjury indicates the draftsmen intended to alleviate or cure a number of defects in perjury law, one of which was the requirement of the Federal statute, 18 U.S.C. section 1621, that "a false statement must be proved not only to be false but also to be material to the proceeding for which it was made. This rule has meant immunity for many witnesses who have willfully given false evidence in court, and much delay and uncertainty has arisen in the course of the interpretation and application of the rule." (Prefatory Note, para 2).

The word "material" as quoted in Sections 1 and 2 of the Model Act (my statement, p. 15) is bracketed. The comment to these sections by the National Conference of Commissioners on Uniform State Laws recommends omission of the word for these reasons:

"It is (1) unnecessary, being mainly a historical survival; (2) it is difficult or impossible of application in many cases, leading to strained exceptions and interpretations by the courts; and (3) it is confusing when argued by counsel and applied by courts and juries, thereby leading to miscarriages of justice and to weakness in the courts in protecting themselves against obstruction by perjurers and suborners of perjury. Moreover, (4) degrees of importance or "materiality" of perjured statements can and should be recognized by courts not as an element of guilt but in apportioning sentence, as provided in Model Act Sec. 4(2), and Sec. 5."

Similarly, Section 4 of the Model Act, dealing with "Proof" furnishes two alternatives, depending on whether or not "materiality" is included in Sections 1 and 2:

"[(2) Proof of Materiality under Act. (This alternative is to be used if the word "material" is inserted in Sections 1 and 2.) The question whether a statement was material shall include only whether the statement might affect some phase or detail of the trial, hearing, investigation, deposition, certification or declaration, and is a question of law to be determined by the court.]"

"(2) Proof of Materiality under Act. (This alternative is to be used if the word "material" is not inserted in Sections 1 and 2.) Lack of materiality of the statement is not a defense [but the degree to which a perjured statement might have affected some phase or detail of the trial, hearing, investigation, deposition, certification or declaration shall be considered by the court, together with the other evidence or circumstances in imposing sentence]."

Finally, on the question of acceptance of the Model Act on Perjury by the states, I submit the following information for the record.

Two states have adopted sections of the Bar Association's approved Model Perjury Act. Arizona adopted all of it in 1953. *Ariz. Rev. Stat.* §13-561-66. Illinois adopted its contradictory statements provisions in the same year. *Ill. Ann. Stat.* ch. 38, §32-2. No other State has directly adopted the language of the Model Act.

The policy judgments its provisions embody, however, are reflected in other States. The two witness rule has been abrogated by statute in New Jersey, N.J. Stat. Ann., §2A: 131–6, and New Hampshire *N.H. Rev. Stat. Ann.* §587:1–d, and relaxed by decision in Arkansas, *Harp* v. *State*, 59 Ark. 113, 26 S.W. 714 (1894). The direct evidence rule has been modified, excluding documentary evidence from its scope in California, *People* v. *O'Donnell*, 132 Ca. App. 2d 840, 283 P. 2d 714 (1955) and holding it wholly inapplicable where direct evidence is, by the character of the issue of fact, e.g., opinion, belief, or memory, necessarily unavailable in California. *People* v. *DeMartini*, 50 Cal. App. 109, 194 P. 506 (1920); in Kansas, *State* v. *Wilhelm*, 114 Kan. 349, 219 P. 510 (1923); in Illinois, *Johnson* v. *People*, 94 Ill. 505 (1880); in New Jersey. *State* v. *Sullivan*, 24 N.J. 18, 130 A. 2d 610 (1957); in Oklahoma, *Shoemaker* v. *State*, 29 Okla. Cr. 184, 233 P. 490 (1925); and Pennsylvania, *Com'th* v. *Sumrak*, 148 Pa. Supr. 412, 28 A. 2d 605 (1942). In addition, the following eleven States have adopted contradictory statement provisions: *Cal. Penal Code* §118a; *La. Rev. Stat. Ann.* §124; *Md. Ann. Code art.* 27 §435; *Minn. Stat. Ann.* §609 48 (3); *N. H. Rev. Stat. Ann.* §587:1–b; *N.J. Stat. Ann.* §2A:131-5; *N.Y. Penal Law* §210-20; *Okla. Stat. Ann.* tit. 21, §496; *Tenn. Code Ann.* §39–3301; *Utah Code Ann.* §76-45-1; *Va. Code Ann.* §18. 1–276.

In the course of my testimony on behalf of the American Bar Association in the hearings on S. 30 of the House Judiciary Committee's Subcommittee No. 5, you requested that I supply a further statement describing the differences between title X of S. 30 as it passed the Senate and title X as it would be amended if the ABA's recommendations were followed, and stating what portions of the existing title X would remain after the ABA's amendments. (Type-written transcript of July 23, 1970, hearing at 481, 494.)

I must begin my response to that request by describing certain points on which supposed differences between title X and the ABA's recommendations were discussed during my testimony.

The provisions of title X which authorize the government to take review of a sentence in terms of bulk but in terms of the relative importance and number of the provisions suggested to be revised, it is seen that the ABA has positively endorsed well over 95% of the substance and provisions of title X, including every key concept and provision. Furthermore, if those eight amendments to title X are adopted, title X will without exception conform to the ABA *Standards* and the formal position of the ABA.

The same observations may be made concerning the other nine titles of S. 30. With them, as with title X, the Board of Governors received, considered and rejected as without merit a great number of constitutional and other criticisms of those titles. The ABA suggested only a limited number of specific amendments, preserving the basic thrust and concept of each of the various titles of S. 30, as well as the great bulk of specific provisions of every title. Indeed, the only suggested amendment to any of the first nine titles which to any substantial extent could be expected to undercut the effectiveness of the title is the proposal that title I grand juries be denied the power to file reports criticizing or exonerating specified public officials. Even that proposal, of course, preserves all the other key provisions of title I, including the power to file reports recommending legislative, executive, or administrative action, or describing organized crime conditions in the district, and a long list of other provisions enhancing the independence and authority of grand juries created under title I. Even in title I, adoption of the ABA's amendments would only partially restrict the effectiveness of the title, while the ABA's amendments to the other titles of S. 30 trench still less upon the key provisions of each title.

That is not, of course, to minimize the significance of the amendments proposed by the ABA. As I testified in the hearing, each proposed amendment is one of substance, and would improve the legislation. Nevertheless, the amendments touch a small part of S. 30. They are, however, respects in which some room for improvement in this important piece of legislation exists—they are not grave flaws—and the Association is grateful for the opportunity to present to the Subcommittee both its suggestions for specific changes in the bill and its unequivocal support for enactment at the earliest possible date.

I trust the foregoing adequately answers all of the inquiries and requests made of me by the Committee. Thank you for your indulgence.

Sincerely,

EDWARD L. WRIGHT.

Mr. ECKHARDT. Mr. Chairman, will the gentleman yield?

Mr. POFF. I yield to the gentleman from Texas.

Mr. ECKHARDT. Mr. Chairman, as the gentleman knows, I am most interested in a constructive way in title X of the bill. I know the gentleman has been the author of the present draft of that section and was also the author of what has been called the Poff amendment in the drug bill. I would like to clear up one thing with my friend on the other side of the aisle on this point. Do I understand correctly that there are two ways in which this sentencing procedure, which I understand is what the gentleman calls it, is activated: One way is by virtue of showing that there have been previous jury convictions. That is one way, is it not?

Mr. POFF. That is one way, but I will say to the gentleman that there are three activating definitions.

Mr. ECKHARDT. Yes, there are actually three, but the first is in the category of an offense for which the person has been convicted. The others are in the category of offenses for which the person has not been convicted. Am I correct in so saying?

Mr. POFF. The first category is the special offender category defined as one who has been previously convicted in the courts of the United States or the States of this Nation for two or more felonies, committed on occasions different, one from another.

Mr. ECKHARDT. Let me say to my friend, I am not raising the points in objection that I am raising here with respect to that section but I understand that in addition to that section, title X may be activated where it is shown that certain elements essential to accentuation of the sentence exist, and these elements may be proved in the post-conviction presentencing hearing. Is that correct?

Mr. POFF. The gentleman is correct. And with respect to the second definition if the defendant is found guilty and adjudged to have committed the felony of which he stands convicted as a part of a pattern of conduct which is criminal under the laws of the jurisdiction, and that pattern of conduct constitutes a substantial source of the defender's income, and the defendant himself was possessed of special expertise or skill, then he would meet the definition of a professional and would activate title X.

Mr. ECKHARDT. Yes, I understand. As a matter of fact, we might divide this second category of elements which are approved in the post-conviction pre-sentencing trial into two groups. One has to do with that which involves participation in certain gains, or certain profits, and the other has to do with certain activities like engaging in a bribe. These two, I understand, are actually different approaches to this objective, and I assume that is the reason the gentleman is referring to three.

Mr. POFF. The gentleman is not quite correct, although he is not altogether in error.

Mr. ECKHARDT. I so frequently find myself in that position.

Mr. POFF. The third definition to which I have reference undertakes to define the typical member of an organized crime conspiracy.

That definition is found on page 145 of the bill. If the defendant is found by the judge to have committed the felony of which he is convicted at bar as a part of a conspiracy with three or more other persons, to engage in a pattern of criminal conduct, and the defendant himself managed or supervised as part of the conspiracy, or in the conduct of the conspiracy, or if he gave a bribe in connection with the conduct, then he would meet the definition of an organized crime special offender and the judge could sentence him up to 25 years as a special dangerous offender.

Mr. ECKHARDT. Then am I correct in saying with respect to these categories—and I am eliminating from consideration the first category of a prior conviction—that there need to be two basic bodies of facts proved. Number one: There has to be the conviction, for instance by a jury, of the original offense which may carry a penalty up to 5 years, say, but not in excess of that amount. Second, it must be proved as an element of applying a 25-year sentence a body of fact the gentleman describes in these categories, the one which relates to the participation in the gains of a crime and the other which involves close participation in a conspiracy, which involves certain elements which are criminal. But in both instances facts in addition to those before the jury must be presented to the court without a jury and the court determines these without a jury, and these elements in addition to what went before the jury are elements necessary to support the enhanced penalty; is that correct?

Mr. POFF. The gentleman is correct. I might add that evidence given before the jury which is relevant to the question of special offender could be considered by the judge in addition to information presented to him in the post-conviction hearing.

Mr. ECKHARDT. I understand that. In other words, evidence can really come in through two sources, but I suppose it would all be, as a practical matter, probably embraced in the probation officer's report. But it could come from the tested source of evidence admissible, introduced and accepted by the court in the jury trial, or it could come in through the source of the probation officer's investigation of the additional facts which we have discussed here as being that other element that makes up the basis for the enhanced sentencing; is that not correct?

Mr. POFF. The gentleman is substantially correct.

Mr. ECKHARDT. I thank the gentleman.

(Mr. McCLORY, at the request of Mr. POFF, was granted permission to extend his remarks at this point in the RECORD.)

Mr. McCLORY. Mr. Chairman, it was my privilege to serve as a member of a subcommittee which heard the testimony relating to S. 30—the organized crime bill. This lengthy and comprehensive measure is directed at many aspects of the organized crime network. It places in the hands of the prosecution a number of necessary weapons in order to deal with the sophisticated operations of organized crime—including its connections with many public officials. Indeed, it is charged that without the cooperation of many of those who are in positions of authority, the crime syndicate could not exist. Accordingly, this measure touches new and sensitive areas which have not heretofore been attempted in any Federal legislation.

In addition to the wide range of subjects covered in this comprehensive bill, I am pleased and proud to point out that the members of the subcommittee upon which I serve gave thoughtful consideration to virtually every line and paragraph in the bill. I want particularly to pay tribute to the chairman (Mr. CELLER) and to my colleague from Virginia

(Mr. Poff) for the very painstaking manner in which they dealt with the entire bill—including the numerous amendments which our subcommittee recommended and adopted. In my experience, no single measure has received more thorough consideration by a legislative committee than this bill. On numerous occasions, it required lengthy discussion in order to arrive at a consensus or a compromise which would accurately reflect the overall views of the subcommittee members. Precedents as contained in numerous court decisions were reviewed and weighed—and every effort was made to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with all who might be affected by this legislation—whether part of the crime syndicate or not.

Mr. Chairman, I shall not undertake to review the various provisions of this bill. This has been done by the chairman of the committee as well as by others. The committee report accurately describes the provisions and impact of this bill, and I am persuaded that it will be fully acceptable to the Department of Justice and to the President, and hopefully will be concurred in by the other body before Congress adjourns or recesses later this month.

Mr. Chairman, in addition to the testimony of individuals who appeared before the committee, the position of the American Bar Association, as well as other organizations which have studied and reported upon this bill, were given due weight and consideration. In my opinion, this is a good bill, consistent with the provisions of the Constitution and responsive to the urgent need for added legislative authority which the Attorney General and the courts require in dealing with the insidious and horrendous impact of organized crime.

Mr. Chairman, I support this measure as reported by the committee and urge its overwhelming passage by the House of Representatives.

Mr. CELLER. Mr. Chairman, I yield 15 minutes to the gentleman from Illinois (Mr. Mikva).

Mr. MIKVA. Mr. Chairman, I suppose I am addressing these remarks to those few people who come from safe districts or to those who decided for some reason or other that they do not want to come back here, or to those who have some kind of death wish about reelection; because I recognize at this point that urging people to vote against S. 30 is not the most politic thing to do.

This bill is not the most politic thing that ever came out of the Committee on the Judiciary, either. The fact of the matter is this bill is not really a bill at all, it is a bagatelle, a clip-and-paste job, put together under pressures that had nothing to do with trying to find real answers to the real problems of crime, organized and otherwise.

I asked my colleague from Virginia to yield to me but he ran out of time; I hope we can engage in colloquy on my time if not on his time.

This bill is for the purpose of controlling organized crime in the United States. Throughout the bill, aside from title XI, which was thrown in at the last minute, organized crime is used over and over again as the hallmark of the bill. The bill is aimed at controlling organized crime.

I ask my colleague from Virginia this rhetorical question: where in the bill does one find a definition of organized crime? There are at least six instances in which that term is an operative fact that is necessary to make other sections come into being; but there is no definition.

When I asked one of the staff members over in the other body, who was one of the major draftsmen of this bill, why there was no definition he said, "Oh, you know, it is very hard to try to agree on a single definition of organized crime."

That answer may satisfy when you are talking about resolution urging the executive to do something or about memorial resolutions for the folks back home but not when you are talking about the criminal law of the United States. It seems to me that if you are saying that the term is incapable of definition, then how in the world can you ask judges and juries to apply it and use it in a criminal law case?

Take, for instance, the very lucid but unfortunately incomplete explanation of title X by my colleague from Virginia. The gentleman from Virginia talked about it as if it were very clear that it is aimed solely at the racketeers and syndicate members that all of us despise and who have no friends in this Chamber. I ask the gentleman if he can show me why, under the various loose definitions put together in title X, that special dangerous offender category does not also include somebody who violates income-tax laws or antitrust laws or the Pure Food and Drug Act or any of the other Federal laws that contain criminal sanctions. Because the operative language under the second category is that the defendant "committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction which constituted a substantial part of his income"—and most income tax evaders do pretty well until they get caught—"and in which he exhibited special skill and expertise." All of the antitrust cases that I ever read would indicate that the perpetrators of an antitrust conspiracy indeed manifest great expertise and skill and engage in many acts over a long period of time. Thus, the "pattern of racketeering" as defined in this bill would clearly cover that, too.

I will be glad to yield to the gentleman if I am in error.

Mr. POFF. No. I thank the gentleman for yielding.

I do not rise to say that the gentleman was in error, but I simply wanted, if I could, to respond to his earlier question about why income tax law violations were not specifically included in title X.

Mr. MIKVA. I did not ask whether they were specifically included, but I ask are they excluded in any way.

Mr. POFF. I will say to the gentleman that it would be difficult to define an income tax violation as a dangerous offense as that offense is defined under subsection (f) on page 147.

Mr. MIKVA. I beg to differ. Will the gentleman read that section, please? It does not say dangerous offense.

Mr. POFF. It says the defendant is dangerous.

Mr. MIKVA. It has nothing to do with the offense.

Mr. POFF. Does the gentleman contend because a defendant filed deliberately an erroneous income tax return that that makes him dangerous?

Mr. MIKVA. No. But the judge may find him dangerous for a variety of other reasons. The point is that the language operates to include him. You had no intention of covering income tax violators or antitrust violators or Pure Food and Drug Act violators, but it includes them even though the section was aimed at racketeers.

Mr. POFF. Exactly.

Mr. MIKVA. But, unfortunately, the language does not so limit itself even though I think the intent of the committee was pure.

Mr. POFF. Mr. Chairman, will the gentleman yield further?

Mr. MIKVA. I would be glad to yield further to the gentleman from Virginia.

Mr. POFF. The gentleman inquired rhetorically as to why no effort was made to define organized crime in this bill. It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant? Would he not be the first to object to such a system?

Mr. MIKVA. That is not a rhetorical question. I had always understood that the criminal laws were supposed to zero in on a particular type of offense. My objection to this bill in toto is that whatever its motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrible examples of overreach.

Mr. POFF. Mr. Chairman, will the gentleman yield further?

Mr. MIKVA. I would like to yield further but I have more examples of overreach which would even curl the hair of the gentleman from Virginia.

I do not know how many of my colleagues engage in a friendly game of poker now and then, but under this definition if five or more of them engage in such a game of poker and it lasts past midnight—you do have that safeguard—thus continuing for a period of 2 days, then you have been running an organized gambling business and you can get 20 years, and the Federal Government can grab off the pots besides.

All of us I am sure, have come across strange characters who are convinced that they have uncovered the scandal of the ages. They are people who are convinced that the entire history of this country was written in a conspiracy and that every elected official and anyone else in a newsworthy capacity is involved in a conspiracy to bring down the democits jurisdiction in this respect is not expanded by this legislation, nor is it the intent to give it concurrent jurisdiction with the FBI.

The Department of the Treasury does, however, have primary jurisdiction over the regulatory provisions of title XI of this bill, and I think this is clearly stated in the bill.

Mr. EDMONDSON. I thank the gentleman.

Mr. POFF. Mr. Chairman, it is important to understand the full context of each title of this bill.

TITLE I—SPECIAL GRAND JURY

Mr. Chairman, title I of S. 30 establishes special grand juries in the major metropolitan areas of the Nation lying in judicial districts having in excess of 4 million inhabitants. This would include these districts: Massachusetts, the eastern and southern district of New York, New Jersey, the eastern and western districts of Pennsylvania, the southern district of Florida, the eastern district of Michigan, the northern and southern district of Ohio, the northern district of Illinois, and the northern and southern districts of California. When the Attorney General determines a need in other districts, based upon organized crime activities in the district, special grand juries will be convened on a case-by-case basis. The district court of its own volition may also order an additional special grand jury impaneled when the volume of business requires it. These special grand juries will meet at least once in every 18-month period. They will ordinarily serve for an 18-month term, subject to extension as necessary for the completion of their business so long as the total time served does not exceed 36 months.

Because it has been deemed advisable to give the special grand juries, whose function it is to inquire into sensitive organized crime activities, a degree of autonomy beyond that enjoyed by grand juries generally, the bill provides that when a district court fails to extend a grand jury's term upon its request or discharges it before it has completed its business, the district judge's decision may be appealed to the chief judge of the circuit court by the grand jury upon a majority vote by its members. The special grand jury will continue to sit pending review of the district court's action. The provision will assure against the dismissal of a special grand jury conducting an organized crime investigation prior to the completion of its work.

In addition to rendering indictments, the special grand juries upon the completion of their terms, or extensions thereof, are expressly authorized to file reports, first, on organized crime conditions in their districts; and, second, on the apparent noncriminal misconduct in office of appointed public officials, where an alleged misfeasance or malfeasance relates in some way to organized criminal activities, as the basis for a recommendation of removal or disciplinary action. Where the reports concern public officers, the persons named in the report are afforded a number of safeguards to protect them against unjustified prejudicial action. The protections afforded include the right to appear and summon witnesses before the grand jury prior to the filing of its report, and an opportunity to file an answer which will be attached to the report. The report will not be accepted by the court, or filed as a public record unless the court is satisfied that any public officer named therein has been accorded these privileges, and unless the court finds that the report is supported by a preponderance of the evidence heard by the special grand jury. Prior to publication of the report, a person named therein or affected by it will also have a right of review in the circuit court of appeals. Reports which reflect organized crime conditions in the community must be confined to general observations based upon the facts revealed in the course of authorized criminal investigations—they may not be critical of identified individuals.

These provisions carry out several important recommendations of the President's Commission on Law Enforcement and the Administration of Justice. The Commission recommended that at least one investigative grand jury be impaneled annually in each jurisdiction that has major organized crime activity, and that the grand jury's term be extended whenever it can show that its business remains unfinished at the end of a normal term. The Commission also suggested that judicial dismissal of grand juries with unfinished business should be appealable to a higher court, and that provision should be made for suspension of the dismissal pending the appeal, since the possibility of arbitrary termination of a grand jury by a supervisory judge would constitute a danger to successful completion of an investigation. The Commission further recommended that when a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community—report, "The Challenge of Crime in a Free Society," page 200.

The experience of Federal prosecuting attorneys attests the validity of the Commission's recommendations. Thomas J. McKeon, who served as a special assistant in charge of a Federal strike force formed in Detroit, Mich., in February 1968, has emphasized the importance of the grand jury to an organized crime investigation. In an article, entitled "The Strike Force" published in the American Bar Association Journal, May 1970, Mr. McKeon recounts the operations of this highly successful unit. With reference to the role of the grand jury, Mr. McKeon says:

> A twenty-three member special federal grand jury was impaneled in Detroit through the cooperation of the chief judge and the entire bench of the district court to sit for an eighteen-month period. Regular federal grand juries usually sit for six consecutive months, and then a new grand jury is impaneled. Organized crime investigations are complex, and an investigation exceeding six months is more the rule than the exception. Therefore, the prospective grand jurors were put on notice by the chief judge that they would sit for the full eighteen-month period.
>
> Over this period and prior to their discharge on September 3, 1969, the grand jury returned forty-nine indictments charging a total of 101 defendants with various federal violations. The indictments ranged from income tax evasion, perjury, counterfeiting, interstate and international gambling, and conspiracy to the smuggling of narcotics and jewels, thefts from interstate commerce, illegal importation of aliens, embezzlement, extortionate loan sharking, sale, possession and illegal transportation of firearms, false ownership of bars, conspiracy to transport obscene matters in foreign commerce, and the deprivation of the rights of union members by the use of force and violence. The grand jurors sat biweekly in one to four-day sessions and heard testimony from hundreds of witnesses. (*Supra*, Vol. 56: 455)

While the primary function of a grand jury is to indict and the special grand juries which are authorized by title I will be summoned only as required to inquire into alleged violations of Federal criminal laws; as I have indicated, they will also be authorized to report upon organized crime conditions as they find them. Through the exercise of its reporting function the grand jury is capable of performing an invaluable service in alerting the community to the threat posed by the criminal syndicates.

Law-enforcement authorities assert that without sustained public pressure, programs to combat the evil of organized crime have little likelihood of lasting success. Sporadic attempts have been made to focus concentration upon the activities of the criminal syndicates since 1951, when the Kefauver committee first alerted the Nation to the extent of their penetration into our society. But today, as in the past, much of the public does not see or understand the effects of organized crime in society. Moreover, what the public does see and read is often seriously misleading. Information about members of criminal syndicates tends to be presented in a sensational manner with liberal use of gangster terminology. Moreover, an emphasis upon reports of gangland killings unfortunately tends to give the impression that mobsters are primarily involved in killing each other. Prof. Donald R. Cressey, a consultant on the President's Task Force on Organized Crime, says:

> The public will not be "educated" about organized crime until it understands that organized criminals prey on the economic and political order, not on each other. (Cressey, *Theft of a Nation*, p. 67.)

Fortunately, the menace of organized crime is receiving more and more exposure through the efforts of citizen groups such as the U.S. Chamber of Commerce which makes available to businessmen through its local chapters a desk book on organized crime, alerting them to symptoms which indicate that the syndicates may be infiltrating their communities and their businesses, and advising them as to what steps may be taken to prevent its penetration. But we still have a long way to go. The publication of grand jury reports on organized criminal activities, and on the enforcement or lack of enforcement of the criminal laws by responsible public officials, can be helpful in this respect, as is indicated by experience in States such as New York and New Jersey in which such reports have long been authorized by either statute or case law.

The authority of regular Federal grand juries to issue reports such as title I contemplates is unclear under existing law. Whereas the release of reports by grand juries at the end of their terms is common practice in some districts, the matter rests upon precedent and the court's discretion rather than upon statute. The U.S. Supreme Court has indicated that Federal grand juries, like their early English and colonial predecessors, may issue reports as well as render indictments—see, for example, *Hannah v. Larche*, 363 U.S. 420, 449 (1960); *Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969)—but the precise boundaries of the reporting power have not been judicially delineated. For this reason, the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this title. The committee does not thereby intend to restrict or in any way interfere with the right of regular Federal grand juries to issue reports as recognized by judicial custom and tradition. Nor does it intend to restrict the right of special grand juries to issue reports of such a nature. The provision included in title I as it was passed by the Senate which expressly authorized special grand jury reports proposing recommendations of a general nature for legislative or administrative action has been deleted by the Judiciary Committee as unnecessary, since existing law already permits such reports by grand juries. See, for example, *Application of United Electrical Radio and Machine Workers*, 111 F. Supp 858 (S.D. N.Y.). Although the title as reported by the Judiciary Committee is shorter than the Senate version, its vital features have been retained.

TITLE II—GENERAL IMMUNITY

Mr. Chairman, title II of S. 30 replaces some 50 Federal immunity statutes now in use with a single, comprehensive provision to be added to title 18 of the United States Code, to govern grants of immunity in judicial, administrative, and congressional proceedings. As you know, the President's Crime Commission recommended that legislative action be taken regarding immunity for grand jury and court proceedings, and, at the suggestion of the National Commission on the Reform of Federal Criminal Laws, title II has been made to deal comprehensively with the overall problem of immunity grants to facilitate the operations of the three branches of Government. The very fact that this highly significant subject matter is to be treated in a single part of the United States Code, rather than in 50-some different and scattered provisions, should prove of considerable benefit.

Title II marks a notable departure from existing legislation on immunity. Whereas existing legislation has gone beyond the breadth of the fifth amendment privilege by granting transaction immunity—by barring prosecution completely in respect to incriminating testimony given—title II creates a restriction on the direct or indirect use of the compelled testimony; such testimony may not be used in any way in developing a prosecution of the witness for any of his past offenses—he will not be forced directly or indirectly to be a witness against himself—but prosecution itself will not absolutely be barred. You will recall that the President in his message on organized crime commended to the Congress the basic concept of title II. Specifically, he said:

> I commend to the Congress for its consideration . . . [the proposal under which] a witness could not be prosecuted on the basis of anything he said while testifying, but he would not be immune from prosecution based on other evidence of his offense.

I might add, Mr. Chairman, that the use-restriction immunity is clearly constitutional, taking note particularly of two 1964 Supreme Court decisions, *Malloy v. Hogan*, 378 U.S. 1, and *Murphy v. Waterfront Commission*, 378 U.S. 52. On the subject of granting immunity in general, I think it very fitting to repeat a comment made in an 1896 Supreme Court opinion:

> Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name to be made the tool of others who are desirous of seeking shelter behind his privilege (*Brown v. Walker*, 161 U.S. 591, at 605).

Mr. Chairman, the Omnibus Crime Control and Safe Streets Act of 1968 enlarged the bases for grants of immunity: they were to be available in a greater number of proceedings than previously—proceedings involving a greater number of offenses. But title II of S. 30 is not limited to investigations involving any particular Federal violations. Nonetheless, for the Department of Justice and the various administrative agencies, the Attorney General must approve use of the immunity provisions, so that this very important matter of immunizing witnesses will be closely controlled. No longer will any witness automatically receive immunity under statutes that title II will repeal; the witness must always claim his privilege against self-incrimination before immunity will be granted. This eliminates a danger that a witness will be immunized by some oblique testimony relative to a criminal transaction automatically—without any claim of privilege—and hence without forethought being given to the matter by the Government. As Justice White wrote in a concurring opinion in Murphy against Waterfront Commission:

> Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination (at 378 U.S. 107).

Where the witness is before either House of Congress, a grant of immunity must be approved by a majority vote of the Members present, and where the witness is before a joint committee or a committee or subcommittee of either House, an affirmative vote of two-thirds of the full membership of the committee is required. But any such intention to seek an order to compel testimony is to be brought to the attention of the Attorney General at least 10 days before the order is sought, and the title provides that the district court shall defer the issuance of an order up to 20 days as the Attorney General may request. This procedure will allow for studied consultation and a weighing of the value and possible consequences of immunizing a particular witness, which procedure is, I believe, an appropriate means of protecting the overriding public interest regarding grants of immunity.

Mr. Chairman, title II of S. 30 arms the Government with an ability, unique in the history of this Nation, to crack the shell of secrecy surrounding organized crime. While giving the witness all that is guaranteed him under the Constitution, title II means that a witness can no longer invoke a privilege of self-incrimination frivolously or in order to shield other parties and expect the Government to be impotent in the face of such conduct. Afforded the immunity to which he has every right, the witness will have to discharge his civic responsibilities or face sanctions under title III of this legislation.

TITLE III—RECALCITRANT WITNESSES

Mr. Chairman, there is no simple solution to the critical problem of securing testimony of witnesses who are loath to cooperate with the Government. The comprehensive immunity provision in S. 30 will not entirely solve the problem. Some witnesses can be expected to refuse to testify even after being immunized from prosecution. The law must provide sanctions for dealing with such recalcitrant witnesses. Title III of S. 30 provides such sanctions.

Courts have traditionally enforced their orders through the exercise of a contempt power. A judge may punish a witness—find a witness in criminal contempt—if he wrongfully refuses to testify or otherwise engages in contumacious conduct. Such a witness may be imprisoned for a certain period of time as vindication of the court's authority. If the contemptuous witness is to be imprisoned for more than 6 months, he should be accorded a jury trial, but, otherwise, he may be imprisoned summarily by the court.

The civil contempt power, on the other hand, is not exercised to punish. A witness who wrongfully refuses to testify and is found in civil contempt of the court is confined for the purpose of inducing his obedience to the court's order, and when he obeys the order he is entitled to his release from custody. As is often said, a witness confined for civil contempt carries "the keys of the prison in his own pocket." Underscoring the civil nature of the sanction is the rule that, upon the termination of the proceedings at which the witness was ordered to testify, the witness is entitled to his release because he could no longer obey the court's order if he wished to do so. Thus, confinement for civil contempt for refusal to testify before a grand jury cannot extend beyond the life of the grand jury, although the witness may be imprisoned again if he contemptuously refuses to testify before a successor grand jury.

Title III of S. 30 seeks to codify the present law on civil contempt as it pertains to a witness' refusal to testify before a grand jury or court, or in proceedings ancillary thereto, in violation of a court order. In the face of such defiance, the court is explicitly authorized summarily to confine the witness, and so that the force of this sanction will not be dissipated, the committee has provided that the witness will not be admitted to bail pending the determination of an appeal unless he can show, and the burden is on him, that the appeal is not frivolous or taken for purposes of delay. It is contemplated, in view of the civil nature of the proceedings, that persons defying court orders will not ordinarily be admitted to bail and that such a person should bear the full burden of demonstrating that his appeal is not frivolous or taken for delay. To this degree, title III differs from rule 46 of the Federal Rules of Criminal Procedure. The title further provides that all appeals from civil contempt orders are to be disposed of as soon as practicable and at least within 30 days of the filing. No period of confinement may last beyond the life or the court proceedings or of the grand jury, including extensions of its original term. The committee has provided that confinement may not exceed 18 months in any event—a limitation that is considered in keeping with the civil nature of the contempt and the object of inducing obedience to the order. Obviously, the 18 months is to run from the date of the confinement for the contemptuous refusal.

Mr. Chairman, title III also amends section 1073 of title 18 of the United States Code, which is entitled "Flight To Avoid Prosecution or Giving Testimony." The statute now supplies a jurisdictional basis for Federal law enforcement personnel to apprehend individuals who flee in order to avoid prosecution, or punishment or the duty to testify in criminal proceedings in the several States. Under the amendment, the statute would be made applicable to witnesses who flee in order to avoid testifying before State agencies authorized to investigate criminal proceedings or service of process by such agencies. This provision should certainly strengthen the hand of the States in their efforts to combat organized crime. At present, a witness might feel fairly secure in fleeing the jurisdiction after being subpenaed to testify before a State investigating commission, thinking that he would not likely be apprehended and extradited; but, under title III, such a witness could be arrested by the FBI for unlawful flight and would thus face a much more certain punishment.

Mr. Chairman, once a witness has been granted immunity protection, his continued refusal to cooperate with the Government should not be tolerated, and there have to be means available for imposing sanctions upon recalcitrant witnesses, hopefully to secure their cooperation but at least to set an example for others. Title III is an essential part of comprehensive legislation aimed at defeating organized crime and, I believe, readily commends itself to approval by this House.

TITLE IV—FALSE DECLARATIONS

Mr. Chairman, title IV creates a new Federal false-statements offense for grand jury and court proceedings which will not be subject to the artificial and anachronistic evidentiary rules that hamper perjury prosecutions in our courts. At present, Federal law imposes upon perjury prosecutions the so-called two-witness rule and the direct evidence rule which respectively require special corroboration of the testimony of the prosecution's chief witness and prevent a conviction from being based upon circumstantial as opposed to direct evidence. Moreover, under existing perjury law it is impossible to convict a witness who has made two irreconcilably contradictory statements unless the Government is able to establish by extrinsic evidence which of the two contradictory statements was false.

The President's Commission on Law Enforcement and the Administration of Justice, upon examining State and Federal perjury statutes, concluded that the criminal law must offer more effective deterrents against false statements, particularly in organized crime prosecutions where fabricated testimony so often defeats convictions. The Commission recommended that—

> Congress and the States should abolish the rigid two-witness and direct evidence rules in perjury prosecutions although maintaining the requirement of proving an intentional false statement. (Report, "The Challenge of Crime in a Free Society," p. 141.)

The integrity of the criminal trial depends upon the power to compel truthful testimony and to punish falsehood. Witness immunity such as title II will provide can be an effective prosecutive weapon only if the immunized witness testifies truthfully. The infrequency of the use of perjury sanctions—due to the difficulty of securing convictions under existing law—has limited the effectiveness of established criminal sanctions for false statements under oath. Using available Federal figures, Senator McCLELLAN's Subcommittee on the Criminal Laws determined that only 52.7 percent of the defendants in perjury cases were found guilty over the 10-year period from 1956 through 1965, while during the same period in all other criminal cases, 78.7 percent of the defendants were found guilty.

Dissatisfaction with the traditional restrictive evidentiary rules—which stem from medieval practice antedating the English common law—has led to changes in statutes in some State jurisdictions. Two States, Arizona and Illinois, have adopted the Model Perjury Act which abolishes the rules, and a number of others have applied the policy of the act to their perjury statutes. Experience in these jurisdictions and common logic indicate that there is no reason why false statements cannot be tried by the same standard of proof beyond a reasonable doubt that prevails in the trial of all other criminal offenses.

Title IV implements the recommendation of the President's Commission, and incorporates the policies of the Model Perjury Act. It provides a false declarations offense punishable by a fine of not more than $10,000 or imprisonment for a term of 5 years, or both, which may be proved by the reasonable doubt standard. It also specifically provides for the prosecution of a false declaration in the case of irreconciliably contradictory statements without the necessity of specifying in the indictment which of the declarations was false. Each declaration upon which a prosecution is based must have been knowingly made, have been material to a point in question in the proceeding in which it was made, and have been made within the statute of limitations for the offense charged. The inconsistent declarations need not have been made in a single proceeding, nor have been material to a single point at issue. The falsity which must be alleged and proved is the falsity of the declaration at the time it was spoken, not a hypothetical falsity which would exist if the declaration were repeated at the time of indictment or trial. The declarant's belief that his statement was true at the time that he made it constitutes an affirmative defense.

The title also contains a recantation or retraction provision, modeled upon a New York penal statute, which permits a witness to avoid a false declarations prosecution by a timely retraction of his testimony within the course of a continuous court of grand jury proceeding. This provision encourages the witness to correct a false statement by permitting him to do so without incurring the risk of prosecution based upon inconsistent statements.

By strengthening the inducement to tell the truth and correct falsehoods, and providing for the effective prosecution and punishment of those who give false testimony, title IV substantially improves the capacity of our courts to administer justice. The usefulness of the title will by no means be restricted to organized crime prosecutions.

TITLE V—WITNESS PROTECTION FACILITIES

Mr. Chairman, just as citizens owe society a duty of coming forward when they are able to give relevant testimony to grand juries and at criminal trials, the Government should accept a responsibility for protecting its intended witnesses from reprisals where the possibility of such reprisals is clear. For this purpose, title V of S. 30 authorizes the Attorney General to rent, purchase, modify or remodel housing facilities and to make such facilities available to jeopardized Government witnesses and their families and otherwise to provide for their health, safety, and welfare. The title is operative, not just in connection with criminal trials, but in connection with any legal proceedings, Federal or State, where the underlying factual situation involves organized criminal activity. Facilities may be made available as long as is required for the protection of the witnesses, and the authority is broad enough to allow for relocation of the witnesses, but no witness is obliged to accept protection offered by the Attorney General under this title. The Attorney General is also authorized, when he offers protection for State witnesses, to condition his offer upon reimbursement by State agencies of all or part of the out-of-pocket expenses involved in maintaining and protecting the witnesses.

Mr. Chairman, this title is responsive to a recommendation by the President's Commission on Law Enforcement and Administration of Justice and meets the criticism that, when protection has been given witnesses, it has too often in the past been withdrawn immediately after the particular trial terminates. This title has the full support of the Department of Justice. Since all the Members of this body are well aware of the need to protect Government witnesses from retaliation by mobsters and other organized criminal elements, I would not elaborate further upon the need for this legislation.

TITLE VI—DEPOSITIONS

Mr. Chairman, title VI is designed to give the Government a right not presently enjoyed to preserve the testimony of its witnesses in criminal cases involving organized criminal activity. The Federal Rules of Criminal Procedure do not provide for this, but only for the taking of depositions under certain circumstances at the request of defendants in criminal cases and of material witnesses held in custody for failure to give bail to testify at a trial or hearing. These provisions are carried over in full in title VI. Title VI simply expands upon rule 15 of the criminal rules so as to meet certain very urgent problems, and there is no intention in meeting such problems to abrogate rule 15 or to limit the Judicial Conference of the United States in the exercise of its rulemaking authority pursuant to 28 United States Code 331 from addressing itself to other problems in this area or from adopting a broader approach. That any narrower approach would be inconsistent with the intent of the Congress is, of course, manifest in the title.

The basic problem that is attacked in this title of S. 30 is the urgent necessity for curbing the power of criminal elements to destroy evidence by harming, intimidating, or bribing Government witnesses. Mr. Chairman, the Congress could treble the number of Federal criminal investigators, and neither that manpower nor the acumen of the individual investigators would mean very much unless the cooperation of witnesses can be secured and maintained, sometimes over a lengthy period, between the time that charges are lodged and the defendants are tried. With the making available of a procedure whereby the Government can preserve testimony for potential use at criminal trials, the inclination of criminals to attempt to frighten or bribe Government witnesses should rapidly subside, and the incidence of such obstructive tactics should decline remarkably.

Title VI adds a new section to chapter 223 of title 18 of the United States Code, entitled "Depositions To Preserve Testimony." Whenever, due to exceptional circumstances, it is in the interest of justice to preserve testimony after the filing of an indictment or information, the courts may grant motions for the taking of depositions. Since the problem seems particularly acute where the Government's witnesses are to testify against defendants involved in organized criminal activity, it was felt appropriate at this time that the provision be reduced to the measure of that most apparent need, and the committee has provided that Government witnesses may be deposed only if the Government's motion is supported by a certification of the Attorney General or his designee that the proceedings are against a person believed to have been a participant in an organized criminal activity. The concept of organized criminal activity is broader in scope than the concept of organized crime; it is meant to include any criminal activity collectively undertaken since in all such instances there is an increased potential for intimidation of Government witnesses. In addition, there is no requirement that the trial at hand be of that sort. It is access to collective criminal power that endangers the witness—whether of the Mafia, the Communist Party, the Black Panther Party, or the KKK. Such a defendant, no matter what he is being tried for—a violation of the Migratory Bird Act, for instance—can bring this power to bear to avoid criminal liability, and that is what this provision is designed to protect against.

Title VI has nothing to do with discovery; the Government and the defendant cannot depose each other's witnesses under the title but only their own witnesses. The object is to preserve the testimony against the danger that it will not be available at the time of trial. But depositions taken under the provision will not necessarily be used at trials; the witnesses will still testify live if that is feasible. Depositions are to be taken to safeguard against dangers that witnesses will die or become ill, that they will be killed or injured, that they might hide or flee or remain outside the jurisdiction, be kidnaped, bribed, or improperly influenced, and so forth. The new language concerning use of depositions at trial is designed to codify present law in this area. It is not designed to circumscribe future judicial developments. Nothing in the provision, for example, would prevent a court from permitting the use of a deposition of a testifying witness not only for impeachment, but as substantive evidence under *California v. Green*, 399 U.S. 149 (1970). Consequently, if a witness is deposed and his attendance and testimony at trial cannot be obtained for the reasons just mentioned, or he refuses to testify at trial, the deposition may then be used as substantive evidence. Moreover, a deposition may also be used under the section for purposes of impeaching a witness who testifies in person.

The taking and filing of the deposition and objections to its being used in evidence at trial are governed by existing practices in civil actions.

The taking and use of depositions under title VI, whether by the defendant or by the Government, is in accord with the concept of due process of law. Charges will have been filed first and the taking of the deposition is a trial in miniature. Even if held in custody, the defendant has a right to be present together with counsel and to be in the presence of the witness, and, whoever originated the procedure, counsel for the opposing side must be afforded an opportunity to cross-examine the witness. Provision is made for the appointment of counsel for the accused. The Government is required under the title to furnish the defendant for use at the taking of the deposition copies of any statements that would have to be given the defendant if the witness were testifying at the trial. When a defendant moves for the taking of a deposition but is unable to bear the expense, the court may direct that the Government stand the expenses incident to the taking of the depositions. The committee has provided that the Government may also be made to bear all such expenses when it is the party moving to take the deposition. Mr. Chairman, I feel sure that title VI affords all the necessary safeguards to allow for use of depositions under the terms of the title—or, in other words the duty of preserving the constitutional rights of accused persons has been fully discharged in providing for depositions under this title. Supreme Court precedent establishes that there is no deprivation of the right of accused to confront the witnesses against them when a record is admitted at one trial of testimony formally taken at an earlier proceeding, such as a preliminary hearing, where the defendant has enjoyed a right to confront the witnesses against him and to cross-examine, *California v. Green*, 399 U.S. 149 (1970), and I submit that title VI is not only a workable provision on depositions but one that is entirely fair for all concerned.

Once again, title VI should prove most effective in stymieing the organized criminal element—Mafia, Black Panther, or KKK—who would think to threaten or injure Government witnesses. Senator McCLELLAN has expressed the idea so well that I would quote him; he said:

> Indeed, depositions may be more effective than stone walls and guards in protecting the lives of informants and other citizens with informations concerning organized crime.

TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE

Mr. Chairman, title VII of the Organized Crime Control Act is designed to regulate motions to suppress evidence in certain limited situations where the motion is based upon unlawful electronic eavesdropping or wiretapping which occurred prior to the enactment of the Federal electronic surveillance laws on June 19, 1968—chapter 119, title 18, United States Code.

Under the procedure which the title establishes, upon a claim by an aggrieved party that evidence is inadmissible because it is the product of an unlawful electronic surveillance, or because it was obtained through a lead developed from an unlawful electronic surveillance, the Government will be required to affirm or deny that an unlawful electronic surveillance in fact occurred. If the claimant has standing to challenge the alleged unlawful conduct, this provision places an affirmative obligation upon the Government to search its records and to ascertain whether there has been an overhearing of a particular defendant. The Government has recently been making such searches a matter of practice—even when no request has been made by the defense—although there has been no statutory authority requiring disclosure of an electronic surveillance which occurred prior to the enactment of a warrant procedure. This title will require such disclosure, but require it only when requested by the defense.

Where there was in fact an unlawful overhearing prior to June 19, 1968, the title provides for an in camera examination of the Government's transcripts and records to determine whether they may be relevant to the claim of inadmissibility. Where there is no relevancy whatsoever, as determined by the Court, the transcripts need not be disclosed to the claimant or his counsel. To require disclosure under such circumstances can serve no purpose in the interest of justice, and may needlessly jeopardize the lives of Government agents and informants, harm the reputation of innocent third persons, and compromise the national security. To the extent that the court is permitted to determine relevancy in an ex parte proceeding, the title will modify the procedure established by the Supreme Court in *Alderman v. United States*, 394 U.S. 165 (1968). The Court in Alderman assumed that adequate protection against the dangers inherent in disclosure of the Government's records to the defendant and his counsel could be afforded by the use of protective orders, but the experience of the Department of Justice has indicated time and again that protective orders are inadequate even to prevent the unauthorized publication of its records and transcripts in the news media.

As I have indicated, the title applies only to disclosures where the electronic surveillance occurred prior to June 18, 1968. It is not necessary that it apply to disclosure where an electronic surveillance occurred after that date, because such disclosure will be mandated, not by Alderman, but by section 2518 of title 18, United States Code, added by title III of the Omnibus Crime Control and Safe Streets Act of 1968. Section 2518(10)(e) provides a specific procedure for motions to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted, that the authorization for the interception was insufficient, or that the interception was not made in conformity with the authorization obtained. It provides, insofar as the disclosure of intercepted communications is concerned, that upon the filing of a motion to suppress by an aggrieved person the trial judge may in his discretion make available to such person and his counsel for inspection such portions of an intercepted communication, or evidence derived therefrom, as the judge determines to be in the interest of justice—see Senate Report No. 1097, 90th Congress Second Session 106, 1968. The provisions of this title will, therefore, control the disclosure of transcripts of electronic surveillances conducted prior to June 19, 1968. Thereafter, existing statutory law, not Alderman, will control. Consequently, in view of these amendments to title VII, its enactment, in conjunction with the provisions of title III of the 1968 act, provides the Federal Government with a comprehensive and integrated set of procedural rules governing suppression litigation concerning electronic surveillance.

Another portion of title VII provides that no claim will be considered that evidence is inadmissable because it is the indirect product of an electronic surveillance occurring prior to June 19, 1968, if the event which the evidence is intended to prove occurred more than 5 years after the surveillance took place. The provision amounts to a legislative directive that as a matter of law no evidence of an event can be found tainted by an alleged illegality anteceding the event by such a long period. This portion of the title does not apply to evidence which is directly procured by electronic surveillance.

This provision may be considered a legislative expression of the principle enunciated by the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471 (1943). Under the facts of the case the defendant, Wong Sun, following an unlawful arrest on a narcotics charge, was arraigned and released on his own recognizance. Several days later he voluntarily returned to the police station and made an unsigned incriminatory statement. The Court, in determining whether the statement was inadmissible as a result of the unlawful arrest, said:

> We hold that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint" . . . (Id. at 491).

In Wong Sun, it should be noted that a time lapse of several days was considered adequate to dissipate the taint. Certainly the time period of 5 years adopted in this provision is sufficiently long to assure that there is virtually no possibility that evidence will have been derived from a tainted lead. The purpose of the provision is not to defeat valid claims of inadmissibility, but rather to spare the courts and Government prosecutors from the burden of spending needless working hours in processing frivolous claims brought solely for purposes of delay. The burden is great where voluminous records of pre-1968 wiretaps and electronic eavesdropping are concerned.

As title VII was passed by the Senate, it applied to illegal acts generally, including all searches and seizures, unlawful confessions, and testimony compelled under lawful grants of immunity. The Judiciary Committee has limited the title to electronic surveillances because it was in respect to these that the Department of Justice indicated the need was greatest. The Department felt that the legislation was superfluous insofar as testimony under grants of immunity is concerned because a grant of immunity constitutionally has never been deemed to apply to future offenses. Although the use immunity concept embodied in title II will produce changes in the impact of immunity grants, the immunity conferred is not intended to be broader than required by existing transaction immunity statutes or the privilege against self-incrimination. There simply exists no constitutional privilege as to offenses that have not yet been committed.

TITLE VIII—SYNDICATED GAMBLING

Mr. Chairman, title VIII deals with syndicated gambling and the related corruption of law enforcement that it engenders. The title is based upon a proposal introduced at the instance of President Nixon who announced in his Message on Organized Crime delivered to the Congress in April 1969 that the administration had determined that the major thrust of its concerted antiorganized crime effort should be directed against gambling activities since "gambling income is the lifeline of organized crime."

There are a number of compelling reasons for giving high priority to an effective Federal effort against organized gambling. First, as the President indicated, illegal gambling constitutes the criminal syndicates' primary source of revenue. The estimated $6 billion to $7 billion a year that represents the profits of illegal gambling, as determined by the President's Commission on Law Enforcement and the Administration of Justice, goes far toward providing the capital that eventually goes into usurious loans, the wholesale narcotics traffic, bootlegging, and the infiltration of legitimate businesses.

Second, from the social standpoint, the professional gambler preys upon society, taking his daily bet—perhaps 25 cents on a number bet or $5 on a horse bet off-track—from the residents of our communities who can least afford it. The President said:

> The most tragic victims of course, are the poor whose lack of financial resources, education, and acceptable living standards frequently breed the kind of resentment and hopelessness that make illegal gambling and drugs an attractive escape from the bleakness of ghetto life.

And finally, from the standpoint of law enforcement, the gambling operations of the criminal syndicates are particularly vulnerable. Because a large-scale gambling operation involves large numbers of persons, is dependent upon the use of communications facilities, and must be protected by bribing and paying off at least a few officials in each locality in which it flourishes, gambling is more susceptible than most organized crime activities to detection and prosecution.

Federal investigators and prosecutors are vigorously proceeding against syndicated gambling operations under existing authority. In May 1970, an intensive investigation conducted by the FBI in cooperation with the organized crime strike force in Detroit culminated in simultaneous raids at 58 locations in Detroit and Flint estimated to be handling in excess of $250,000 daily. The raids resulted in the arrest of 54 persons for violation of section 1952 of title 18, United States Code, by using interstate telephone facilities in aid of an unlawful gambling operation. Attorney General Mitchell, characterizing this as "the largest Federal gambling raid in history," said:

> Through operations such as this, this administration is convinced it can dry up the biggest source of funds for organized crime in this country.

Title VIII provides new tools for curbing both the large-scale gambling operations themselves and the corruption of local officials which they foster and upon which, in turn, they depend.

Part A of the title contains a special finding that illegal gambling involves the widespread use of, and has an effect upon, interstate commerce and the facilities of interstate commerce. This finding is of substantive importance to the title because by creating a legislative jurisdictional base it makes Federal gambling investigations and prosecutions possible without the necessity of establishing an interstate nexus on a case-by-case basis. The necessity for establishing a specific link to interstate commerce or the facilities of interstate commerce, under existing antigambling statutes has frustrated many criminal investigations and foreclosed the possibility of Federal prosecutions, even where gambling transactions were being conducted on a scale which necessarily affected commerce under judicial interpretations of the commerce clause. The Senate-passed bill contained extensive findings to spell out with particularity the manner in which gambling businesses necessarily utilize the channels of commerce, and how gambling affects the flow of money in commerce. The substance of the findings has been included in the legislative commentary of the bill reported by the Judiciary Committee rather than in the bill itself. Title VIII is squarely premised upon the commerce power as defined by the U.S. Supreme Court in *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Part B of the title would make it a Federal felony for large-scale gamblers and local officials to conspire to obstruct the enforcement of State and local laws against gambling through bribery of public officials. Part C would make it a Federal offense to engage in a large-scale business enterprise of gambling. No part of the bill is intended to preempt local efforts to enforce antigambling laws. On the contrary, title VIII's expansion of the Federal jurisdiction over large scale gambling cases will improve local efforts, not merely by providing an impetus for effective and honest local enforcement, but also by making available to assist local efforts the expertise, manpower, and resources of the Federal agencies which under existing Federal antigambling statutes have developed high levels of special competence for dealing with gambling and corruption cases. The International Association of Chiefs of Police has endorsed title VIII, recognizing it not as a substitute but as a valuable addition to State efforts.

Part D of the title would establish, 2 years after its enactment, a commission to review national policy toward gambling. The commission will examine every aspect of the gambling problem, from data on the scope and types of legal and illegal gambling, to the broadest and most basic social policy grounds upon which public and governmental attitudes towards gambling rest. Its proceedings and report will serve to enlighten the public on the relationship between local gambling and the national syndicates, and will provide a basis for a thorough reexamination by the Federal and State governments of gambling policies, laws, and enforcement practices.

I wish to point out, in particular, two unique provisions of the bill which are not contained in other Federal antigambling statutes. One is a forfeiture provision which will permit any property used in illegal gambling, including money to be seized and subjected to judicial forfeiture procedures. This provision will be of tremendous assistance in closing down gambling establishments and keeping them out of business.

The second provision establishes a presumption, for the purpose of showing probable cause for obtaining warrants for arrests, interceptions, and other searches and seizures, that a business operated by five or more persons for 2 or more successive days, receives gross revenue in excess of $2,000 in any single day. The presumption is supported by the experience of the Department of Justice, which indicates that a gambling business of this dimension receives far in excess of this amount daily. This finding goes solely to probable cause and cannot be utilized to establish proof of an element of the offense at trial. Arrests without warrants depend upon the same constitutional standard of probable cause, and upon establishment of the same jurisdictional criteria as search and arrests warrants issued pursuant to the title. It may therefore be assumed that the same probability will exist.

Title VIII in its entirety will be of great assistance to Federal investigators and prosecutors, and we may anticipate that the strike forces will put it to immediate use.

TITLE IX—RACKETEER-INFLUENCED AND CORRUPT ORGANIZATIONS

Mr. Chairman, perhaps the single most alarming aspect of the organized crime problem in the United States in recent years has been the growing infestation of racketeers into legitimate business enterprises. This evil corruption of our commerce and trade must be stopped. Title IX of S. 30 provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped and the process can be reversed when such infiltration does occur.

Title IX represents, in large measure, an adaptation of the machinery used in the antitrust field to redress violations of the Sherman Act and other antitrust legislation. I would not attempt to say who was first to suggest the re-tooling of the antitrust machinery to combat organized crime, but one of the earliest and stoutest proponents of such an approach was the American Bar Association. The Department of Justice has been consulted, of course, in drafting the legislation and fully supports title IX.

Title IX adds a chapter to title 18 of the United States Code, but it contains both civil as well as criminal provisions. The provisions of the title operate largely against racketeering activity as defined in the bill or, more precisely, against patterns of racketeering activity. "Racketeering activity" is defined to include a wide variety of crimes, both State and Federal, that are generally associated with organized crime. A "pattern of racketeering activity" means simply two or more acts of racketeering activity, one of which, in order that the provision will not be an ex post facto law, must have occurred subsequent to enactment of the title. The two acts essential to the pattern must occur within 10 years of each other, excluding periods that the offender is incarcerated.

Title IX makes it a crime for anyone to acquire, maintain, or conduct any enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity or collection of debts incurred in an illegal usury operation. It is also made criminal for anyone to invest in an enterprise, with certain limitations, funds that were derived from either a pattern of racketeering activity or collection of debts incurred in an illegal usury operation. The maximum penalty provided is $25,000 fine and imprisonment for 20 years, and there is also provision for criminal forfeiture of the property interests involved in the violations. The courts may issue restraining orders and require performance bonds to prevent postconviction transfers in an effort to defeat the forfeiture provisions, and governance of the forfeited property is provided for after the fashion of civil forfeitures under the customs laws. Under these provisions, the racketeering influence in an enterprise can be destroyed; no longer will one racketeer simply take over in the place of another who has been convicted and sent to prison.

Courts are given broad powers under the title to proceed civilly, using essentially their equitable powers, to reform corrupted organizations, for example, by prohibiting the racketeers to participate any longer in the enterprise, by ordering divestitures, and even by ordering dissolution or reorganization of the enterprise. In addition, at the suggestion of the gentleman from Arizona (Mr. STEIGER) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.

The title also amends section 2516 of title 18 of the United States Code to include the activities made criminal under the title within the list of specific offenses for which the interception of wire or oral communications is permitted under court order.

Another prominent feature of title IX is the provision for civil investigative demands. This is to give the Attorney General a civil counterpart to grand jury process; it will enable the Department of Justice to obtain by civil process documents and materials relevant to a racketeering investigation. These provisions are patterned after the Antitrust Civil Process Act, section 1311 and following of title 15 of the United States Code. But the demands must be reasonable and may not seek materials that would be privileged if sought by a subpena duces tecum; moreover, there are provisions governing the return of the materials.

I should not take the time to go into all of the many provisions of title IX; but I believe the committee will find the title a carefully drawn and worthwhile body of legislation—that is to say, legislation that holds out very clear promise of solving the extremely serious problem of the infiltration of racketeers into legitimate businesses. That problem, I submit, is deserving of the highest priority in the ordering of our domestic affairs.

TITLE X—DANGEROUS SPECIAL OFFENDER SENTENCING

Mr. Chairman, title X deals with one of our society's most difficult problems—sentencing of organized crime leaders and dangerous recidivist offenders. Title X will allow judges concerned about dangerous criminals who prey upon law-abiding citizens to impose terms consonant with the defendant's pattern of criminal conduct.

The procedure for special offender sentencing which is incorporated in the title has been developed from sentencing concepts advanced by the American Bar Association in its "Standards Relating to Sentencing Alternatives and Procedures," the American Law Institute in its "Model Penal Code," and the National Council on Crime and Delinquency in its "Model Sentencing Act." Although the problems of sentencing have received the attention of legal scholars and members of the bench and bar in undertakings such as these, they have received scant attention from Congress and the courts.

One difficulty with our sentencing law has been that, for a given crime, every offender has been exposed to the single maximum punishment authorized by the Congress. The emphasis has been entirely upon the bare element of the crime which the defendant has committed and not upon the kind of person the defendant is and the overall context in which the offense was committed—the circumstances of aggravation of the offense. Yet modern penologists believe that, in sentencing, the court should have broad leeway to consider the criminal and the circumstances surrounding the commission of the offense, as well as the crime. The present sentencing structure does not provide terms of sufficient length to protect society by incapacitating recidivists, professionals, and leaders of groups engaged in organized crime.

A staff study made by the Criminal Laws Subcommittee of the Senate Judiciary Committee a year ago, based upon FBI sentencing data, indicated that two-thirds of the La Cosa Nostra members included in the study and indicted by the Government since 1960 have faced maximum jail terms of 5 years or less. Fewer than one-fourth received maximum jail terms for the offenses of which they were convicted. Twelve percent did not go to jail at all. The sentences for the majority of these organized criminals averaged only 40 to 50 percent of the maximums which were authorized by law. The study appears in more detail in the CONGRESSIONAL RECORD, volume 115, part 26, page 34389.

The defendants upon whom special extended sentences may be imposed pursuant to this title will all be hard-core offenders—in some but not all cases they will be leaders of criminal syndicates. Three types of criminals are defined and singled out for special treatment as follows:

The first type is the three-time felony repeater, who may or may not be a member of a criminal syndicate. Recidivists are, of course, obvious examples of offenders for whom terms longer than the normal maximums are required. The National Commission on the Cause and Prevention of Violence reported that "by far the greatest proportion of all serious violence is committed by repeaters. While the number of hard-core repeaters is small compared to the number of one-time offenders, the former has a much higher rate of violence and inflicts considerably more serious injury"—CONGRESSIONAL RECORD, volume 115, part 26, page 35546. We have gone too long without a Federal general recidivist statute, and it would be intolerable if now we should reject this opportunity to enact a law making the distinction between aggravated offenders and ordinary ones for the purpose of sentencing.

The second type is the professional offender. He is typified by the veteran bank robber, safe cracker, or counterfeiter, a hard-core criminal who may have devoted his entire career to criminal pursuits but has not necessarily been three times convicted.

The third type is typified by the organized crime offender. It includes the defendant who is convicted of conspiracy to engage in a pattern of criminal conduct, or is convicted of a felony which is in furtherance of a conspiracy, where he acted in a position of leadership, or used force or bribery to accomplish the objective of the conspiracy. Efforts were made when S. 30 was before the Senate to restrict the classification to offenders who engaged in a list of specified offenses presumably typical of organized crime activity. However, the Senate realized that members of the criminal syndicates engage in too great a variety of criminal operations to permit any restriction to a list of offenses. The Judiciary Committee, following the Senate's example, refrained from imposing any restriction upon the type of criminal activity which is encompassed.

Title X contains a provision for appellate review of sentences which is of great importance for offenders who are shown to be unusually dangerous to society and are exposed to unusually long sentences. A review is provided when sought either by the defendant or by the Government. However, any increase _ a sentence upon appeal will be permitted only at the instance of the Government.

The provision of appellate review implements a recommendation of the President's Commission on Law Enforcement and Administration of Justice that—

> There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in organized crime activity or groups. Constitutional requirements for such an appellate procedure must be carefully explored. (Report, "The Challenge of Crime in a Free Society," p. 203.)

The review provisions have been carefully framed to meet constitutional requirements. Since it seems clear from the Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that due process of law requires that a defendant must be protected from the possibility that an increased sentence will be imposed upon him by a vindictive court as punishment for his having exercised a right of appeal, title X has been drafted so as to assure that any change in a sentence to the detriment of the defendant will result solely from the Government's action and not from his own. To this end, the Senate version of S. 30 provided that a sentence may be increased only upon review taken by the Government; that the Government's right to take a sentence review must be exercised at least 5 days before the expiration of the defendant's right to seek sentence review or appeal of his conviction; that an increased sentence will be foreclosed if the Government withdraws its review; and that any review taken by the Government will be dismissed upon a showing of abuse of the right to take such a review.

The Judiciary Committee added clarifying language to assure that the taking of a review of the sentence by the Government will be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. The Senate version was less than clear on this point. Thus, the taking of a sentence review by the United States brings about the same result that would follow if the defendant had exercised his right to take both a review of the sentence and an appeal of the conviction. The danger of retaliation which led the Court to the result obtained in North Carolina against Pearce, supra, is entirely absent even from question in the Judiciary Committee version of title X.

Subject only to the foregoing limitations upon increased sentences, the appellate review provisions permit the court of appeals after considering the record in the court below, including the entire presentence report on the defendant, information submitted during the trial and at the sentencing hearing, and the court's findings and reasons for the sentence imposed—to affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing.

Taken together, the portions of the bill relating to increased sentences and to appellate review of sentencing, will do much to correct lenient sentencing of extraordinary, dangerous offenders.

I should like to take this opportunity to point out certain changes in the Senate version of title X which the Judiciary Committee has made at the suggestion of the American Bar Association.

Mr. Edward L. Wright, then president-elect of the American Bar Association, testified at the hearings on S. 30 before Subcommittee No. 5 of the House Judiciary Committee, on July 23, 1970, in

No. 10

CONGRESSIONAL RECORD — SENATE October 12, 1970

Mr. McCLELLAN. Mr. President, on January 15 of last year, I introduced, along with my distinguished colleagues, the Senator from Nebraska (Mr. HRUSKA), the Senator from North Carolina (Mr. ERVIN), and the Senator from

Alabama (Mr. ALLEN), S. 30, the Organized Crime Control Act of 1969.

Later in that session of the Congress other bills dealing with organized crime problems were introduced. All of them were referred to the Judiciary Subcommittee on Criminal Laws and Procedures, which I am privileged to chair. After appropriate hearings on these measures, the subcommittee worked the provisions of seven of these bills into the 10 substantive titles that made up the text of the comprehensive organized crime control measure (S. 30) which was later reported to the Senate.

Senators EASTLAND, MUNDT, ERVIN, HRUSKA, TYDINGS, and the late Senator Dirksen authored bills that were ultimately incorporated, in part at least, into S. 30. President Nixon, too, contributed great assistance to our efforts in the development of this legislation with his message on organized crime of April 23, 1969, in which he recommended one item in particular—which was covered specifically by S. 2022—and expressed his strong support for four other measures, S. 30, S. 1624, S. 1861, and S. 2122.

Members of both sides of the aisle—and of all political philosophies—contributed to the favorable reception that S. 30 received and to its passage by the Senate on January 23 of this year by a vote of 73 to 1. Incidentally, Mr. President, 22 Senators who were not present at the time of Senate passage have since announced in the RECORD that if they had been present they would have voted for passage. This brings the announced and recorded support of Senators for the measure to a total of 95.

Mr. President, because of this practically unanimous support, I had hoped that the House would expeditiously process it and that we would have had favorable action on it by the House long before now. However, those expectations were not altogether fulfilled.

The House Judiciary Committee did not begin hearings on the measure until May, nearly 4 months after Senate passage, and did not report the bill to the House until September 30, more than 9 months after it passed the Senate. However, on last Wednesday, when the House was given the opportunity to consider and vote on S. 30, it passed the measure—largely in the form and with provisions substantially as it passed the Senate—by a resounding vote of 341 to 26. It is significant, I think, that the principles of all of the original 10 titles of the measure were retained by the House.

The House added two new titles: One dealing with bombings and explosives, and the other setting up a Commission on Individual Rights.

Mr. President, I have examined with some care the bill as passed by the House. In view of the comparatively and largely minor changes made by the House, I must confess that I am at some loss to understand why the House Judiciary Committee took so long to process this measure. The hope of some and the expectations of a few that this bill would be emasculated in the House certainly has not materialized. No bill is perfect, and every measure can be improved by the study of those who with good will have that objective.

It is in this context, therefore, that I can say that a few of the changes made in the bill by the House are clarifying and strengthening. In this context, too, I particularly welcome the suggestions made in the House hearings by the American Bar Association. The bar association approved S. 30 as it passed the Senate and urged its "swift adoption." However, it did make some suggestions from improvement. I think all of the suggestions it recommended, and which were adopted by the House, improved the bill, except one—and that is the amendment with respect to grand jury reports. Possibly the most weakening amendment passed by the House is the one that excludes elected officials from those persons who might be made the subjects of grand jury reports.

It may be noted, Mr. President, that, in contrast, the Senate rejected a motion—an amendment—that would have had a similar effect by a vote of 59 to 13. I, for one, do not see how we can make applicable to others provision of a bill which we are unwilling to have apply to ourselves.

Some of the other House changes, nevertheless, seem to be little more than an exercise in semantics. The Senate bill, for instance, made "manifestly contradictory" declarations sufficient in themselves to establish falsity in a false declaration or perjury prosecution. The House measure requires the declarations to be "irreconcilably inconsistent." There may be a difference in the two tests, but it is surely one of small practical importance. Many other changes made by the House, I think, are comparable and can be described in like terms.

Mr. President, S. 30 is vitally needed legislation. Its provisions will correct several difficulties in the evidence gathering processes which are especially troublesome in organized crime cases. It will limit defense abuses of pretrial hearings, extend Federal jurisdiction over major cases of gambling and corruption, curb organized crime infiltration of legitimate organizations, and authorize extended sentences for Federal offenders.

This bill, Mr. President, embodies the recommendations of such august bodies as the American Bar Association, the President's Commission on Crime and Administration of Justice, and others.

Mr. President, a fair assessment of the House bill as compared to the Senate bill leads me to conclude that the House bill now contains at least 85 to 95 percent of the most important provisions that were in the bill as it passed the Senate. Thus, the force and efficacy of the Senate measure is substantially retained.

Mr. President, we are approaching a recess of the Congress this week. A conference could not possibly act on this measure until after Congress reconvenes—sometime the latter part of November. Therefore, in view of the foregoing, Mr. President, I have concluded that the comparatively small difference between the House amendments and the provisions in the Senate bill can hardly justify the certain further delay—and the possible disagreement—that a conference might entail. This law is needed. Every day that its final enactment is delayed will lend further convenience, comfort, and protection, if not immunity, to many organized crime offenders. The Nation needed this legislation when it was introduced. It needed it 6 months ago. It needs it now.

Mr. President, for the reasons I have stated, I most respectfully recommend that the Senator accept the House amendments, and I so move.

Mr. HRUSKA. Mr. President, it is gratifying to note that the other body has finally passed the Organized Crime Control Act (S. 30) which this body had passed in January of this year by a vote of 73 to 1. From January, until it was reported by the House Judiciary Committee approximately 2 weeks ago, the bill saw no action in the House despite the urgency of its enactment caused by the serious crime conditions which today prevail across the nation.

The bill as reported by the House Judiciary, and as passed by the House last week by an overwhelming bipartisan vote of 341 to 26, contains essentially all of the provisions of S. 30 as it was passed by this body. Although the House Judiciary Committee purported to make a considerable number of changes in the legislation, the chances were not of major significance. The most important change which the House effected was to incorporate a title dealing with the unlawful use of explosives and incendiary devises. That title contains provisions similar to those appearing in the Senate bill on the same subject, S. 3650, which the Senate passed last Thursday, October 8.

S. 30 contains many of the anticrime measures which the President recommended in his message on organized crime delivered to the Congress nearly 18 months ago, in April 1969. It includes provisions for a wide range of needed procedural reforms dealing with virtually every stage of the criminal justice process from investigation through prosecution, conviction, and sentencing. It also contains, as passed by the Senate and now by the House, two innovative substantive titles dealing respectively with illegal syndicated gambling and the infiltration of legitimate business by racketeering methods. In addition to the title dealing with explosives and incendiary weapons which, as I mentioned, was added by the House, the bill retains the 10 titles from the Senate version which provide as follows:

Title I, Special Grand Jury—creates special grand juries to sit for extended terms of 18 months, or longer if necessary, in densely populated districts where the influence of organized crime is greatest. These special grand juries will not only return indictments, but upon the completion of their terms may issue public reports upon organized criminal activities and the noncriminal misconduct of appointed public officials which facilitates such activities.

Title II. General Immunity—creates a single uniform witness immunity statute which will enable the Government in any court, administrative, or legislative proceeding to obtain the testimony of a witness who otherwise refuses to testify on the ground that he might incriminate himself. The immunity provided protects the witness from the use against him of his compelled testimony and its fruits in any prosecution for offenses committed prior to the time he testified, but does not foreclose prosecution for his past criminal offenses upon the basis of entirely independent evidence.

Title III. Recalcitrant Witnesses—enforces the immunity provision by expressly authorizing civil contempt proceedings against witnesses who refuse to comply with a lawful order of the court to testify in a grand jury proceeding or trial.

Title IV. False Declaration—discourages fabricated testimony by creating a false statement statute applicable in court and grand jury proceedings which eliminates the anachronistic two-witness rule for perjury prosecutions, provides for perjury prosecutions on the basis of irreconcilable contradictory statements under oath, and permits the Government to prove the offenses by proof beyond a reasonable doubt.

Title V. Protected Facilities for Housing Government Witnesses—authorizes the Attorney General to offer protective housing facilities to endangered witnesses in organized crime cases and otherwise to provide for their welfare and safety both before and after they testify. It is intended to assure, insofar as is possible, the attendance of important prosecution witnesses at trial, and to fulfill the community's obligation to the witness who performs a public duty by testifying at the risk of life and limb in a criminal proceeding.

Title VI. Depositions—permits the Government to take and preserve the testimony of a witness in a prosecution of any person who is believed to have engaged in any organized criminal activity, that is, not an isolated offense by an isolated offender where it is feared that the witness may die, hide, flee the country, or be killed, injured, kidnaped, bribed, or intimidated into silence prior to trial. This may upon occasion save a witness' life by eliminating the criminal syndicate's primary motivation for doing away with him.

Title VII. Litigation Concerning Sources of Evidence—will expedite trials of organized crime offenders by modifying the existing practice where a defendant claims the Government's evidence is inadmissible because it was discovered through an improper electronic surveillance conducted prior to the act of June 19, 1968—Public Law 90-351, title III, section 802—which provided statutory authority for surveillance warrants. Thereafter, title III will act of its own accord.

Title VIII. Syndicated Gambling—makes it a Federal offense to engage in the operation of a large-scale illegal gambling enterprise, or to participate in a conspiracy to obstruct the enforcement of State gambling laws through the corruption of State or local authorities. It implements the administration's intent to focus upon illegal gambling as the financial lifeline of organized crime.

Title IX. Racketeer Influenced and Corrupt Organizations—makes it unlawful to use income obtained from certain designated racketeering enterprises to acquire an interest in a business engaged in interstate commerce, to use racketeering activities as a means of acquiring such a business, or to operate such a business by racketeering methods. The title utilizes criminal forfeitures and civil remedies modeled upon the antitrust laws to prevent and restrain violations.

Title X. Dangerous Special Offender Sentencing—permits a Federal court, under appropriate safeguards, to impose a sentence of imprisonment for up to 25 years upon a dangerous felony offender when the felony of which he is convicted constitutes a third felony offense, or when the felony was committed as part of a pattern of conduct which indicated that the defendant was either a professional criminal or a participant in a leadership or other key position in a criminal conspiracy. Extended sentences may be imposed only after the court has held a special sentencing hearing at which the defendant will be present with counsel, and the sentencing procedure is made subject to review by the courts of appeal.

Mr. President, these measures are urgently needed if we are successfully to combat the growing menace of organized crime in this Nation. Moreover, although opponents of this legislation in the House argued that its enactment will have no effect upon the street crime which so concerns our citizens and renders our streets unsafe, nothing could be further from the truth. Organized crime with its virtual monopoly over illegal goods and services, including the illegal traffic in narcotics and the efficient fencing of stolen goods, encourages street crime by inducing narcotics addicts to mug and rob, and housebreakers and burglars to steal. Moreover, organized crime penetrates the depth of our society in ways of which many citizens are unaware. The Attorney General said at the Senate subcommittee hearings on S. 30:

> Perhaps the most insidious feature of organized crime is its ability to victimize many millions of our citizens who for the most part are not aware of how they are affected, or that they are affected at all. The housewife for example, has no way of knowing that when the price of meat, bread, vegetables or dairy products rises, the increase may be the result of an organized crime conspiracy. The wage earner may be unaware of misuses of his union pension fund. The investor may be unaware of stock market manipulations resulting from massive purchases and/or sales of securities by organized crime syndicates. The taxpayer is unaware of his revenue losses from organized criminal activity which make his taxes go up. The ghetto resident who looks upon the numbers game as an opportunity to escape poverty fails to realize that organized crime drains millions of dollars each year from the poor through this operation.

Mr. President, S. 30 as passed by the House is little changed from the strong bill for the control of organized crime that was passed by this body last January. It still represents an effective response to the problems which the threat of organized crime poses to the Nation. Because of the urgency of the legislation, I recommend that this body by approving the pending motion now unanimously agree to the House amendments, avoid the necessity for a conference, and speed this vital measure to the President for his signature.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield.

PROGRAM—UNANIMOUS-CONSENT REQUEST

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that immediately upon the conclusion of action on the pending question, the Senate proceed to the consideration of Calendar No. 1300, the Occupational Health and Safety Act.

Mr. GRIFFIN. Mr. President, I must object at the request of and on behalf of other Senators. Unfortunately, the business of the Senate requires that some Senators who have a very key role and a very personal interest in this legislation must be involved in conferences on other legislation this afternoon.

As the Senate is aware, this bill of some 91 pages has some controversial provisions in it and members of the Committee on Labor and Public Welfare who must and wish to participate in the debate could not do so this afternoon. Therefore, I must respectfully object.

Mr. BYRD of West Virginia. Mr. President, I can understand the objection made by the able assistant minority leader. I would like, therefore, to revise my request.

Mr. President, I ask unanimous consent that on tomorrow not later than 3 p.m., the unfinished business be laid aside, to remain in that status until the conclusion of morning business on Wednesday next, and at that time, on tomorrow, the Senate proceed to the consideration of Calendar No. 1300, the occupational health and safety bill.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. MUSKIE). The Senator from Arkansas is recognized.

Mr. McCLELLAN. Mr. President, reserving the right to object, and I shall not object, I would like to ask the Senator if this would preclude the offering of a resolution from the floor and asking for its immediate consideration.

Mr. BYRD of West Virginia. Not at all.

Mr. BAYH. Mr. President, I wonder if our distinguished leader would withdraw that particular unanimous-consent request and permit me to make one which deals with the present order of business.

As the principal cosponsor and floor manager of the pending order of business I feel obligated to pursue all avenues open, within reason, to see that this measure is pursued as diligently as we can in this body. I must admit, in all honesty to my colleagues, I have some inkling that I shall not be successful in the request, but I feel duty bound to pursue those requests, hoping the anticipated objector would have the benevolence in his heart not to object.

Mr. BYRD of West Virginia. Mr. President, I temporarily withdraw my request.

ORGANIZED CRIME CONTROL ACT OF 1970

The Senate resumed the consideration of the amendment of the House of Representatives to the bill (S. 30) relating to the control of organized crime in the United States.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Arkansas.

Mr. COOPER. Mr. President, reserving the right to object, although I do not think I will object. I desire to ask some questions about the bill. I know the concern held in the country and the Congress about the rising tide of crime, and the interest in the bill before us. I recall this bill when it passed the Senate as one including many new titles, and many new provisions, recommended either by the Department of Justice and the President, or recommended by the Committee on the Judiciary under the leadership of the Senator from Arkansas (Mr. McCLELLAN), and the Senator from Nebraska (Mr. HRUSKA).

Now the bill is before us again as amended by the House, and without time for consideration. We do not know exactly what these amendments are. I recall that in the Senate debate questions were raised about controversial provisions which went beyond the accepted, or at least what has been considered as accepted principles regarding the rights of individuals. I spoke on the bill when it was before the Senate and expressed my opposition to some sections of the bill.

I wish to ask a question about title II, General Immunity. Was that section changed in any way by the House?

Mr. McCLELLAN. As amended by the House, the bill retains substantially what was in the Senate bill. The only important change made was to require the approval of the Attorney General before Federal agencies could grant immunity. That strengthens the bill, and it is a very good amendment.

Mr. COOPER. That is, an agency of the Federal Government?

Mr. McCLELLAN. Yes.

Mr. COOPER. Of course, it applies only to the Federal courts.

Mr. McCLELLAN. Only to the Federal courts or to those here in the District of Columbia.

Mr. COOPER. And to Congress?

Mr. McCLELLAN. Well, Congress would not have to ask the Attorney General.

Mr. COOPER. The bill states "legislative branch."

Mr. McCLELLAN. It applies to the legislative branch and the executive branch of the Government.

Mr. COOPER. I remember several great debates in the Senate in past years on the question of how far Congress could go by statute to compel a witness to testify against himself. As I understand the amendment, if this bill is passed, there will be no restriction upon the authority and power of any Federal court or any Federal administrative body to compel the testimony of a witness? The breadth of the amendment raises the issue of possible conflict with the fifth and sixth amendments.

Mr. McCLELLAN. No; there are certain procedural restrictions.

Mr. COOPER. Procedural restrictions?

Mr. McCLELLAN. Yes. But it is not limited to a particular class of cases, like kidnaping or robbery or murder. Perhaps the Senator has that in mind. It covers all categories of crime.

Mr. COOPER. Title VII refers to Litigation Concerning Sources of Evidence. Does it affect existing practice where a defendant claims the Government's evidence is inadmissible because it was discovered through an improper electronic surveillance conducted before the 1st of June 1968?

What does the House bill do with respect to title VII?

Mr. McCLELLAN. The House has modified it by making it applicable only to electronic surveillance. Also, it is limited to surveillance that occurred prior to June 1968, the date on which title III of Public Law 90-351 was enacted.

Mr. COOPER. The situation about it is that——

Mr. McCLELLAN. Electronic surveillance subsequent to that time is controlled by the 1968 act, where the disclosure standard is the same as it was set out in title VII. See Senate Report No. 1097, 90th Congress, second session at 106 (1968). When the Senate passed title VII, it was not limited to electronic surveillance, so it was necessary to make it apply to acts occurring after 1968. This new language applies, however, only to surveillance prior to 1968.

Mr. COOPER. This title would limit the volume of tapes or the record of the surveillance which would be made available to the defendant.

Mr. McCLELLAN. Anything now if it was taken prior to 1968. The Senator can appreciate that there are cases where, if everything was made available, it would cause a great deal of trouble.

Mr. COOPER. Let me ask a question about title 10. We are about to vote on an important measure, and there are questions which deserve attention.

Title 10 refers to Dangerous Special Offender Sentencing. Does it mean that if an individual is tried and is convicted for a third felony then an additional sentence could be imposed upon him by the court?

Mr. McCLELLAN. Yes; that is correct, up to 25 years. The Senate had fixed the period as 30 years. The House cut it down.

Mr. COOPER. Does it provide also that if, after having been convicted of a felony, the court should determine that he had been engaged in a pattern of conduct which indicated that he was a professional criminal or a participant in an organized criminal conspiracy——

Mr. McCLELLAN. It does in part provide that, but I point out to the Senator that this is on the basis of a hearing before the court. Today, the court may take into consideration anything in the world it wanted to in setting a sentence, any kind of hearsay or anything else, and, without any standards at all, impose a sentence, but this provides a standard and requires a hearing on imposition of these additional or aggravated penalties for the offense.

Mr. COOPER. A hearing on which the court could impose an additional 25 years?

Mr. McCLELLAN. Up to 25 years in lieu of. But that would be true if the individual met the standard set out in the statute.

Mr. COOPER. I think that answers my questions. I am not on the committee, and have not had a chance to study the bill as amended by the House.

On this short colloquy. I am not able to suggest that if a court can impose an additional penalty, up to 22 years upon an individual as a professional criminal through a hearing, without any trial by jury serious institutional questions are raised.

Mr. McCLELLAN. There is nothing really new in this, I might say to the Senator. Twenty-three States give life sentence to a recidivist. Often the sentence is mandatory. But here is the difference: Now, as the Senator knows, the court can without review take into account whatever it wants to in affixing the amount of the sentence when it has discretion in the case. But here if this procedure is undertaken, the defendant is entitled to a hearing and representation by counsel, and the court hears the matter; so he is not denied due process. And the penalty is not mandatory.

I might say this to the distinguished Senator: The American Bar Association endorsed this provision of the bill, and I believe they recommended that, inter alia, instead of 30 years, 25 years be the limit, and the House of Representatives accepted that.

I have no quarrel with what the House did on this measure.

Mr. COOPER. I thank the Senator. I know of his great interest and his effort in this subject. I know that almost everyone in the country is concerned about crime. I am, and all of us are. But because I have in past year, raised these questions about the balance, if it can be attained, between the rights of an individual and the rights of society, I have in this very slender and incomplete way raised again the same question. I know they will be tested in the courts, a great many of the issues, and I would have to say, upon a very brief look at the bill, that some of these provisions are of doubtful constitutionality.

That is quite a bit for me to say, but I think so.

Mr. McCLELLAN. Very well. I was very glad to give the Senator the answers as far as I could.

Here is the situation: I have concluded that there is not enough difference, actually, between the House bill and the Senate bill to go to a conference—taking into account that we would have additional delay, and perhaps a deadlock in the end. There is just not that much difference. I would say 90 percent of the force and efficacy of the Senate bill is retained by the House amendments, and some of the House amendments were good. They were constructive, and we have no objection to them.

Mr. FANNIN. Mr. President, I had hoped that the tragedy at the University of Wisconsin when an innocent man was killed in a bombing would somehow result in a slackening of terrorist activity in our Nation.

But now we have the bombings on the west coast and the explosions today which damaged five buildings, including two churches, in New York.

It has become obvious the senseless destruction of property and lives will continue until strong action is taken by law enforcement authorities. We must give these authorities the power they need.

I urge that we complete action quickly on antibombing measures which are still pending either here or in the House.

By accepting the House amendments to S. 30, the Organized Crime Control Act, we would be taking a step in the right direction. It would strengthen the law on the distribution and misuse of explosives.

The sooner we get tough with these terrorists, the sooner we can restore peace and security to our churches, our public buildings, and our campuses.

We cannot be too harsh in dealing with this type of crime. There is no greater criminal than the person who destroys property and kills innocent people in trying to overthrow our Government.

Mr. DOLE. Mr. President, passage by the House of Representatives of an amended version of S. 30 is a most welcome if somewhat belated action.

It is impossible to overstress the importance of S. 30's legislative attack on organized crime. This is especially true in the light of recent studies on organized crime, including that of the President's Commission on Law Enforcement and the Administration of Justice, which have identified its alarming expansion into the field of legitimate business. This penetration of industry poses two distinct but related dangers: First, the economic strength of organized crime is perpetuated and enhanced when tainted proceeds are invested in legitimate enterprises. Second, the free channels of trade are threatened by organized crime's propensity to obtain monopoly control of areas it enters by whatever means are available, including terror and strongarm tactics.

The techniques and methods used in the infiltration of legitimate business enterprises are many and varied. A few case histories will demonstrate how easily a business can fall captive.

The New York Times edition of June 29, 1969, reported how a New Jersey organized crime leader, Gene Catena, gained a foothold in a detergent manufacturer's business, North America Chemical Corp., of Patterson, N.J., by serving as a sales consultant. According to testimony released by the New York Harbor and Waterfront Commission, the owner of the detergent manufacturing company hired Catena's sales agency, called Best Sales, in 1964 under a 10-year contract which was not subject to cancellation. Catena and Best Sales thereafter, through the medium of arson and murder, attempted to force the A. & P. Tea Co. to buy a detergent that the company had previously tested and rejected.

Another method used to acquire control is to corner a market on essential goods or services and then to withhold them from the legitimate businessman until he surrenders an interest in his business or makes a related economic concession. This method is illustrated by recent testimony released by the New York State Investigation Commission. In one case an executive of a major New York meat concern was compelled to use an organized crime controlled knife grinder service or face the loss of his pork supply which was controlled by a leader in organized crime, Paul Gambino.

Although prosecutions and convictions of leaders or organized crime and their confederates are increasing each year as the Federal Government's organized crime program gains momentum, it is becoming increasingly apparent that convictions of underworld figures remove them from control of syndicated enterprises but do not reach the property interests of the syndicate. Control passes to another organized crime leader and the financial structure remains intact.

Title IX of the Organized Crime Control Act, as passed by the Senate in January and by the House last week, contains a proposal designed to curtail—and eventually to eradicate—the vast expansion of organized crime's economic power. Broadly speaking, this title would create strict criminal penalties for using the proceeds of racketeering activity to acquire an interest in businesses engaged in interstate commerce, or to acquire or operate such businesses by racketeering methods.

In addition, this title, by utilizing remedies heretofore applicable in the antitrust field—the remedies of injunction, dissolution, divestiture, and reorganization—would forge a weapon for putting the syndicate out of business. By removing leaders of the organized crime from positions of ownership, by preventing them and their associates from regaining control, and by visiting heavy economic sanctions on their predatory business practices, this legislation will prove an effective deterrent to further expansion of organized crime's economic power.

This and the other titles in S. 30, ranging from special grand juries and a comprehensive immunity provision to a central attack on illegal gambling and enhanced sentences for special dangerous offenders, has emerged with few significant changes by the House. We would dispense with the time-consuming and unnecessary Senate-House conference. Instead we should unanimously accept S. 30 as amended in the House and send it directly to President Nixon for his signature.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Arkansas.

The motion was agreed to.

Mr. HRUSKA. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. McCLELLAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. **Hruska**. Second, in concluding my remarks, I have to my left a long-time associate, Mr. Harold Velde, who was on my staff when I was Senator here. He had duties as my liaison on this committee. He later left me and became director of the LEAA and then, in more recent years, he has been here in this body and I want to recognize the many fine services that he has rendered during all that time.

The **Chairman**. The Senator trained him well.

Mr. **Hruska**. Thank you.

I hope, if there is any occasion for any further reference, I will be happy to be of service.

The **Chairman**. Thank you, Senator. I think you have covered it well.

I just have one question, and we can move on to these other witnesses. We have so many witnesses on this subject today.

If you had the opportunity to revise the existing civil RICO provisions in light of recent developments in litigation, do you have any specific limitations or proposals for reforming the civil RICO law?

Mr. **Hruska**. Mr. Chairman, I think I would like to defer to the Assistant Attorney General, who will shortly testify, because he knows the mechanics of it. He knows the details of how these should be constructed. But I feel that the way the present qualifications could become dependent, being based upon criminal acts which are not proven under the seventh circuit, criminal acts which are not proven—the degree of proof that is required for the commission of the crime itself, and that would be one of the things which should be tightened up, and the list should be made more tightly drawn so as to have a relevant bearing upon the causes of action which are proposed.

The **Chairman**. Thank you very much.

Mr. **Hruska**. Mr. Chairman, I would suggest that the Supreme Court has not spoken, and we hope it will be before they adjourn for the summer.

I will be happy to supply an outline or an addendum to my statement in which I would comment and further answer your question, and also the impact of that Court decision on the present law.

The **Chairman**. Thank you very much, Senator. It is always a pleasure to have you here. You always enlighten us and you are very helpful, and we appreciate it.

Mr. **Hruska**. Thank you, Mr. Chairman.

The **Chairman**. Our next witness is the Honorable Stephen S. Trott, Assistant Attorney General of the Criminal Division of the United States Department of Justice.

Mr. Trott, I am just wondering if we could put your entire statement in the record and maybe let you take 5, not over 10 minutes, to give us the thrust of it, and then let me ask you the questions.

STATEMENT OF HON. STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. **Trott**. Mr. Chairman, I would be very pleased to do that although, with your permission, I would like to take sections from my statement and make statements from them. I would like to go over some aspects of my statement with you.

The CHAIRMAN. All right. You may proceed.

Mr. TROTT. Thank you.

I have with me Mr. Paul Coffey of our Organized Crime Section, who sits in judgment on those issues with regard to civil RICO suits.

Mr. Chairman and members of the subcommittee, it is a pleasure to be here today to discuss the views of the Department of Justice on the RICO statute as used by the Government and, in the civil arena, by the private sector.

Some 15 years ago, the Department supported RICO's enactment as a significant step forward in our efforts to reduce the influence that organized criminal groups exercise at all levels of society. Today, more than ever, we reaffirm that support. When applied correctly, RICO remains an exceptionally valuable law enforcement tool. In my statement today, I would first like to provide some general observations about RICO based on our own use and experience, including the procedures by which the Criminal Division controls and authorizes the filing of RICO cases initiated by the Department of Justice. I will suggest some possible improvements which I believe would increase RICO's effectiveness in criminal prosecutions. I will then address RICO's civil provisions, both in terms of governmental litigation and as used between private parties. It is no secret, of course, that the recent proliferation of private RICO suits in the Federal courts has generated considerable discussion throughout the legal community. We understand and share the concern of those who believe that, to a significant extent, private civil RICO is not being used as originally intended, and we stand willing and ready to join in the effort to see what can be done to correct this situation.

CRIMINAL RICO

As the subcommittee knows, for several years after its enactment in 1970, RICO was used sparingly by Federal prosecutors. By 1980, at the ripe old age of 10 years—by which time perhaps as many as 250 RICO prosecutions had been initiated—RICO was still subject to widely contrasting interpretations and confusion in the courts, most notably in the definition and application of terms such as "enterprise," "pattern of racketeering," and "forfeiture."

In more recent years, however, use of RICO has dramatically increased as prosecutors and courts alike have become more familiar with the enterprise concept, and more knowledgeable of RICO's considerable strengths. By the end of 1984, Federal prosecutors had brought more than 500 criminal RICO cases. Moreover, since 1980, the Criminal Division has asserted greater control of RICO prosecutions by requiring Federal prosecutors to secure Criminal Division approval of RICO cases prior to indictment. The results, I am pleased to report, have been impressive. Indeed, it would take several hours to describe the significant RICO cases that have been brought in the past 4 years. Allow me instead to indicate statistically how our use of RICO has increased and briefly summarize a few particularly significant cases. The point, of course, is to underscore the need to preserve RICO as the leading statutory weapon against all forms of organized criminal conduct.

NUMBER AND TYPES OF CASES

In 1981, the Criminal Division received some 71 requests for approval to initiate RICO prosecutions. In 1982, the number dipped slightly to 68. Although these figures suggest frequent use of RICO, I should note that there are 94 U.S. attorney offices nationwide. Some of these offices did not have occasion to file RICO prosecutions in either year, whereas our offices in the large metropolitan areas, such as Manhattan, Chicago, and Miami, filed numerous RICO indictments. In 1983, the figure rose to 109, and in 1984 it rose again, to 123.

These annual numbers by no means reflect the true magnitude of criminal RICO's importance, even in a statistical sense, since individual RICO cases typically include a number of defendants. To convey the impact of RICO prosecutions more accurately in this respect, I should note that, during the past 2 years, close to 400 defendants have been charged with RICO violations by the Organized Crime Drug Enforcement Task Forces alone.

With our increased emphasis on organized crime, public corruption, labor racketeering, infiltration of legitimate business, and on our most serious problem—narcotics trafficking—bigger, more complicated cases have been developed, utilizing sophisticated court-approved electronic surveillance, extensive undercover operations, and other similar investigative techniques. Such cases invariably develop evidence of large scale criminal operations, encompassing multiple and varied offenses, sometimes spanning 5 or more years, and involving a wide range of actors. These are the kinds of cases for which RICO was specifically designed.

Our analysis of the 1984 RICO requests indicates that narcotics offenses were the most frequent primary predicate crime charged, followed closely by acts involving official corruption [bribery]. Mail and wire fraud, while far and away the most frequently alleged predicate activities in private civil RICO cases, were the primary activities only half as often as drug offenses and bribery in criminal RICO cases. We also found that while 47 percent of RICO prosecutions approved in 1984 alleged only Federal crimes as predicate acts, 39 percent contained combined allegations of State and Federal predicates, and 14 percent alleged only State predicates, such as murder, bribery of State officials, and arson. These figures reflect one of RICO's greatest virtues: It permits Federal and State prosecutors, working together, to combine evidence of serious Federal and State crimes into comprehensive prosecutions in order to strike at the heart of criminal cartels. I should note parenthetically that the 1985 RICO approvals to date continue to reflect narcotics offenses, bribery, and murder as the most frequently recurring RICO predicates.

Statistics, of course, rarely provide the full picture. It is not the increase in the number of RICO cases that reflects increased effectiveness—although the numbers do suggest an increased awareness by prosecutors of RICO's potential—it is the outstanding quality of recent cases that demonstrates our effective application of RICO, both criminally and, more recently, civilly. Let me give you a few examples.

In 1984, the Court of Appeals for the Sixth Circuit upheld RICO-murder convictions of Cleveland's mob boss and several key lieutenants. All received lengthy prison sentences. Another Federal jury in Cleveland, thereafter, convicted the remainder of Cleveland's mob leadership for RICO-murder and narcotics offenses, effectively removing the entire mob leadership from the streets of Cleveland.

RICO was used, of course, to convict New Orleans mob boss Carlos Marcello for bribery offenses. It was RICO that sent Los Angeles mob boss Dominic Phillip Brooklier and fellow racketeers to jail for extortion and murder, and RICO that provided the basis for convicting former Teamsters president Roy Williams and Chicago mob members for a conspiracy to bribe a U.S. Senator.

The hierarchy of the Bonanno crime family of New York City was convicted of RICO-murder charges in 1982; also convicted of RICO-murder charges were leaders of the mob in Rochester, NY, on October 30, 1984. You may have read recently in the newspapers of the RICO-murder convictions in St. Louis of a group of union racketeers who engaged in a series of car bombings. Last week, the key defendants were sentenced to 55 years in prison. In fact, both the Cleveland and St. Louis cases, to name but two, involved murderous explosions on public highways

In New York City, RICO indictments are pending against the leadership of the Colombo crime family, against the heads of the mob's five families—called the "Commission" case—against several significant leaders of the Genovese and Lucchese crime families, against labor racketeers who allegedly controlled trucking at New York's JFK Airport, and finally, against 35 individuals who allegedly imported into the United States hundreds of millions of dollars worth of heroin from Europe.

In Boston, a RICO-murder case is pending against the leadership of Boston's mob family, the leader of which has been linked recently to currency violations involving the Bank of Boston.

In Kansas City, alleged leaders of both the Kansas City and Chicago syndicates are awaiting trial on RICO charges relating to skimming operations at Las Vegas casinos.

The collective impact of these cases against the mob is truly staggering and would have been unheard of 5 years ago.

Nor has RICO been limited to traditional organized crime. In Chicago, RICO was effectively used in Operation Greylord to convict corrupt local judges, lawyers, and policemen. In Louisiana, Gov. Edwin Edwards is awaiting trial on RICO-mail fraud charges. In New York City, a RICO case is pending against Marc Rich, a fugitive, for an alleged $100 million oil miscertification scheme.

For the same reason that RICO has proved so effective against the mob, it has become an effective tool against domestic terrorism, as evidenced by two RICO indictments last month. A case in Seattle alleges that 23 members of "The Order" engaged in acts of terrorism and violence, including the murder of a well-known Denver radio personality. In Arkansas, a RICO indictment was filed against members of a neo-Nazi organization called "The Convenant, the Sword, and the Arm of the Lord," for alleged arson of religious buildings and an attempt to blow up a natural gas pipeline.

The above cases, while among our most dramatic, are by no means the only significant RICO achievements. The list literally goes on and on.

DEPARTMENTAL CONTROL OVER RICO PROSECUTIONS

But, while RICO remains both broad in scope and powerful in execution, I wish to emphasize our recognition that, for these very reasons, we have a special obligation to use the statute responsibly, and to stress the efforts we make to discharge that obligation. In September 1980, the Criminal Division promulgated written guidelines to all Federal prosecutors governing RICO indictments. These guidelines, which have been most recently updated in March 1984, remain in effect today and are designed to first, weed out the ill-advised RICO case, second, provide consistency in legal pleadings throughout all of the Federal districts, and third, encourage the teamwork between prosecutors and agents on the Federal and State levels that the RICO approach to the "big case" invariably requires.

To secure approval to file a RICO indictment, or complaint in the case of civil RICO, the prosecutor—usually an assistant U.S. attorney or an attorney assigned to the criminal division, such as a strike force attorney—must submit a written request, called a prosecution memo, and a copy of a proposed indictment to our organized crime and racketeering section.

The prosecution memo identifies the defendants, summarizes the evidence, anticipates potential defenses or legal problems, describes proposed forfeitures or other special remedies, and articulates the prosecutor's justification for the use of RICO. The prosecution memo is reviewed by an experienced RICO staff reviewer and by at least one deputy chief of the organized crime section. We independently assess the significance of the case and the sufficiency of the RICO count. We pay special attention, for example, to ensure in each case that the "pattern of racketeering" required under RICO involves two or more distinguishable criminal episodes. I mention this particular point because a frequent criticism of civil RICO cases filed by private plaintiffs is that the RICO complaint is predicated on a single fraud of a single victim carried out through multiple mailings.

No RICO indictment is approved until the section is satisfied that the evidence as represented is sufficient to obtain a conviction, that the indictment is in proper form and consistent with similar RICO cases elsewhere in the country, that RICO is necessary to reflect adequately the nature and seriousness of the crimes charged, and that, when State crimes are proposed as RICO predicate acts, State authorities are either unlikely to proceed themselves or have requested the department to prosecute the case, frequently in conjunction with their own prosecutors. For your convenience, a copy of our official RICO guidelines is attached to my statement.

IMPROVEMENTS IN CRIMINAL RICO

Having discussed our procedures and successes in RICO prosecutions, I would now like to briefly mention two areas where we can make improvements in criminal RICO. Before doing that, however, I should first acknowledge the steps recently taken by Congress to make the statute more effective. In recognition of RICO's value, Congress last session buttressed the statute in several important respects. Pornography and currency reporting offenses were added to the list of RICO predicates. The scope of RICO forfeiture was expanded by relating back the Government's interest in forfeitable property to the date of offense. And more authority was provided for courts to issue pretrial restraining orders. These latter two provisions help prevent defendants from avoiding forfeiture by disposing of their assets before conviction.

We have two suggestions for additional improvements. First, we strongly recommend that RICO be amended to include the forfeiture of substitute assets. At the present time, when a defendant is convicted of a RICO violation, the court must order forfeiture of any interests the defendant has acquired or maintained in the illegal enterprise, any property affording the defendant a source of influence over the illegal enterprise, and any proceeds the defendant has derived from the illegal activity. However, in many cases, the property subject to forfeiture cannot be located, is beyond the jurisdiction of the court, or has been transferred to a third party. To meet these problems, the department recommends that the RICO statute be amended to authorize the forfeiture of other property of the defendant up to the value of any property with which the subject has enriched himself but has dissipated or otherwise made unavailable. This provision would close a large loophole which undercuts the effectiveness of the criminal forfeiture statute.

The most common example of this situation occurs when drug dealers deposit proceeds from drug trafficking into offshore banks or use proceeds to purchase property outside of the United States. Such property is usually beyond the reach of the court. However, the defendant may have property or bank accounts within the United States which are not related to the racketeering activity. The substitute assets provision would allow the court to reach this property in lieu of the assets that the defendant has deliberately placed beyond the reach of the court.

Both legal theory and case law support this provision.

Section 1963(c) provides that "all right, title, and interest in property * * * vests in the United States upon the commission of the act giving rise to the forfeiture." Under this relation back doctrine, the property is forfeitable as of the time of the violation, even though the property would not be transferred to the Government until after conviction. By taking post-violation steps that make forfeitable property unavailable to the court after conviction, a defendant deprives the United States of property to which it is entitled. Thus, if the defendant has other assets available, the Government should be entitled to substitution.

A recent court ruling supports this rationale. In *United States* v. *Conner,* 752 F. 2d 566 (11th Cir. 1985), the court held that, when the forfeiture involves a specific sum of money, it acts as a money judgment against the defendant for the same amount of money which came into his hand illegally, regardless of whether the Government has traced the path of the specific illegal funds. It matters not whether the Government receives the identical money which the defendant received or other substitute money. While the *Conner* decision effectively applies the substitute assets concept to fungible items such as money, it does not cover all situations which may arise and does not remove the need for enacting the substitute assets provision.

A substitute assets provision was included in forfeiture legislation which three times passed the Senate in the 98th Congress. However, this provision was not included in the Comprehensive Crime Control Act of 1984. The Department believes strongly that this provision is important and that the justification for such a provision, in light of the *Conner* decision, has become compelling.

My second recommendation concerns the predicate acts relating to obstruction of justice. At the present time, section 1503 of title 18, the basic obstruction of justice statute, is a RICO predicate crime. However, in 1982, when the Victim and Witness Protection Act was enacted, all references to witnesses were removed from section 1503 and new sections 1512 and 1513 were enacted to provide greater protection for witnesses than did section 1503. Unfortunately, sections 1512 and 1513 were not added to the list of RICO predicates. As a result, serious criminal conduct, such as intimidating a witness, now covered in section 1512, or retaliating against a witness, now covered in section 1513, probably cannot be included as part of a RICO violation, even though it is clear that such conduct was intended to be included. Since it is uncertain whether such conduct can be prosecuted under section 1503, we recommend that this anomaly be rectified by adding sections 1512 and 1513 to the definition of racketeering activity in section 1961(1) of title 18.

I will now briefly discuss governmental use of civil RICO before moving to the private RICO controversy.

SUITS FOR INJUNCTIONS

Section 1964, the principal civil RICO provision, permits the district courts, upon application of the Attorney General, to enter appropriate orders to prevent and restrain violations of criminal RICO. This provision is designed to allow the United States to remove organized criminal influence from the business and financial communities. Naturally, prosecutors prefer, and are trained, to achieve this exorcism through criminal prosecutions that result in lengthy jail sentences, stiff fines, and forfeiture of criminal proceeds. Consequently, we have made very little use of civil RICO in the past. On only five occasions in the past 15 years, by our research, has the Department filed a civil RICO action; of these five cases, only one merits comment, the recent *Local 560* case in New Jersey, which is now pending appeal in the third circuit. We hope to build upon the legal principles established in Local 560, to produce similar cases in the future.

In *United States* v. *Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), the Government proved that mob members had continuously committed acts of murder, extortion, violence, and labor racketeering for 20 years as part of their effort to seize control of Teamsters Local 560 in Union City, NJ. Despite repeated arrests, prosecutions, convictions, and even lengthy incarceration of these racketeers, they returned again and again to their union offices with appalling effrontery. At the time the RICO complaint was filed in 1982, these mobsters—either directly or through friends and relatives—utterly dominated the local's executive board, and had used their positions to gain access to union funds. As the district court put it, these "gangsters, aided and abetted by their relatives and sycophants, engaged in a multifaceted orgy of criminal activity."

Applying sanctions permitted by section 1964, the court enjoined the defendants from further acts of racketeering, removed the entire executive board from their positions as trustees, created a temporary trusteeship for the union, and ordered a democratic election under governmental supervision following an 18-month cooling off period. The granting of these extraordinary remedies, which the court described as the use of a judicial scalpel to remove a malignancy, may well accomplish a goal that prosecutors once thought unattainable in a civil context, namely, the liberation of a large labor organization from the tentacles of organized crime.

The *Local 560* case, in many ways, has opened our eyes to the potential of civil RICO. Over the years, the Department, as well as the Congress, has identified other labor organizations and legitimate businesses—for example, casinos—that have been or still are influenced to some degree by criminal groups. We are confident that the courts will continue to construe civil RICO liberally to help eradicate these influences and that future cases along the lines of *Local 560* will be instituted.

SUITS FOR DAMAGES

Another governmental entity civil RICO case, to which the Department is not a party, bears comment. On April 5, 1985, the Federal Deposit Insurance Corporation, FDIC, filed a nine count complaint in Kansas charging several defendants with fraud in the collapse of the Indian Springs State Bank. The complaint includes a RICO count, which alleges mail and wire fraud as predicate acts of racketeering. The FDIC, suing both in its corporate capacity and in its capacity as receiver, is seeking over $16 million in actual damages, plus treble damages, plus $35 million in punitive damages.

I would like to make two points in this context. First, as you know, allegations of contract and program fraud, such as in the area of defense contracts, have been the subject of much concern expressed recently by Federal agencies and much attention in the national media. Every Federal agency is a potential victim—a very rich victim I need not add—of schemes that fit within one definition or another of fraud encompassed by the RICO statute. If the Department has one primary concern, it is that the RICO statute be used uniformly and wisely to preserve the advances that have been made through gradual and diligent effort.

I am confident that the FDIC suit, which is related to a joint investigation between the FDIC and our Organized Crime Section, is fully warranted. However, we believe that it is imperative for the future development of civil RICO that the approval of the Attorney General be obtained before Federal agencies file civil RICO suits. We all know that bad cases result in bad law. Without the Attorney General's review of governmental RICO suits, it is conceivable that one agency of the Government could proceed under a RICO theory, or seek a type of remedy, that is inconsistent with a position taken in some other case by the Department or another Federal agency. As it is, the Department occasionally suffers an adverse judicial interpretation of RICO growing out of a private suit; it would hurt doubly if such a result occurred because the government itself could not agree on a uniform approach.

Second, section 1964(c) of title 18 provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore—and shall recover threefold the damages he sustains." I am pleased to note that the Department of Justice last week filed in the Middle District of Florida the first civil RICO suit seeking treble damages on behalf of the United States as an injured person. That suit seeks to recover more than $47 million from two businessmen and three companies previously convicted of criminal RICO and other offenses involving a massive fraud against the Government in connection with the awarding of Department of Defense laundry contracts. This suit represents a major step forward in the Department's effort to use effectively the powerful civil provisions of RICO in appropriate cases. However, the success of this suit will depend on the courts' upholding our view that the Federal Government is a person as defined in section 1961(3) of the RICO statute. Since RICO specifically authorizes the Attorney General to bring suits for injunctive relief, the statute's failure to expressly refer to the Attorney General in the treble damages section raises an arguable inference that RICO presently does not provide for treble damage recovery by the Federal Government.

We believe that the statute should be amended to explicitly allow the United States to file damage suits for injuries suffered by it as a direct result of RICO violations. The Government already has authority to sue for injunctive relief on behalf of others and, presumably, on its own behalf as well. Thus, it would be anomalous to deny it the right to sue for damages when the United States has been injured by a RICO violation. Such suits could provide a particularly valuable method of protecting the public treasury from fraudulent misuse of Federal funds. Damage suits by the United States would make possible the recovery of Federal funds—provided either through Government programs or Government contracts—that have been fraudulently obtained or misused, as well as the recovery of other losses suffered by the government, such as in the FDIC case.

The option to sue under such a provision would provide other benefits as well. For example, the possibility of recovering treble damages under RICO might make litigation worthwhile in situations in which the recovery of actual damages only might not be cost-effective. Second, the possibility of a treble damages suit by the Government would have a significant deterrent effect on persons contemplating the fraudulent acquisition or misuse of Government funds. With all of the recent revelations of possible fraud in the area of Government contracts, such added deterrence would certainly be welcome. In this connection, it is important to remember that the Federal interest in an effective effort against organized, systematic illegality—whether manifested by fraud against the Government or other conduct detrimental to the interests of the United States—is, in essence, an interest in a result. There is no apparent reason for limiting the Government to the use of criminal prosecutions or civil injunctive actions to achieve that result.

If the Government were authorized to bring treble damage actions, the measure of such damages should be treble the loss that the Government suffered as a result of the acts which gave rise to the RICO violation. For example, if a person obtained $1 million from a Government program under false pretenses, constituting a RICO violation, the amount of damages should be three times $1 million. The important point is that there should be no requirement of a separate racketeering injury such as the Second Circuit Court of Appeals has imposed in *Sedima S.P.R.L.* v. *Imrex Co.*, 741 F. 2d 482 (2d Cir. 1984), *cert. granted,* 105 S. Ct. 901 (1985). The damages should be based on the actual amount of damages proven by the Government.

Adoption of this proposal could provide significant benefits to the Government, and substantially enhance the deterrent impact of civil RICO. At the same time, because the Department would be screening and controlling these cases, there would be no basis for criticisms such as are now being generated by irresponsible uses of the civil RICO statute by private plaintiffs.

USE OF CIVIL RICO BY PRIVATE LITIGANTS

In the few years since the plaintiffs' bar discovered the attractiveness of RICO's private civil remedy, private RICO suits have generated considerable controversy among litigants and courts. This controversy has led to growing pressure for statutory changes, and a number of specific proposals have been advanced that would modify the private right of action to prevent abusive litigation. We agree that there is a need to address this problem, but express no preference at this time for any of the particular approaches or specific proposals that have been put forward. We will be pleased to address these matters at a future date, however, if the committee wishes.

At this point—the outset of the committee's inquiry—we think it may be most helpful to attempt to place in perspective the major questions that have arisen regarding private uses of civil RICO. To that end, I propose in this section of my statement to review briefly the history and current applicability of the private remedy provision, to describe the findings of a Department of Justice study of reported private civil RICO litigation, to summarize the debate over private uses of the statute, to identify the fundamental issues that we believe are raised by that debate, to discuss the interests of the Government that seem to us to bear upon the resolution of those issues, and to summarize the range of options available to the committee regarding the future of private civil RICO enforcement, commenting briefly on some of the apparent advantages and disadvantages of the major possible approaches.

PRIVATE CIVIL RICO'S HISTORY AND APPLICATION

As I have already mentioned, RICO's private civil remedy permits a person who has been injured in his business or property by reason of a violation of section 1962 to sue for treble damages. He may also recover the cost of suit, including a reasonable attorney's fee.

At the outset, we think it is important to place this provision in context—not only in the context of the RICO statute, but also in the context of the far broader legislative undertaking of which that statute itself was only a part. As you recall, RICO was enacted as title IX of the Organized Crime Control Act of 1970, the purpose of which was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." First among the factors recited by Congress as providing the impetus for the Organized Crime Control Act was the finding that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually draws billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."

RICO itself was aimed at one particular area of organized criminal activity—the increasing use of power and money obtained from illegal activities to infiltrate and corrupt legitimate businesses, labor unions, and other enterprises. However, rather than attempting the futile and probably unconstitutional exercise of defining and outlawing "organized crime," Congress deliberately chose to focus on the types of conduct characteristic of persons engaged in organized crime. In doing so, Congress rejected criticisms that the legislation was too broad and would reach beyond organized crime. As Senator McClellan, the principal Senate sponsor of the legislation, put it:

> It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

In a similar vein, Congressman Poff, the principal House sponsor, stated:

> Every effort was made to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with all who might be affected by . . . [the] legislation—whether part of the crime syndicate or not.

RICO's provision of a private treble damage remedy was a late addition to the statute. Two of the predecessor bills had included such a remedy, but that provision was dropped in the process of the Senate's conversion of the legislation from an antitrust form of statute to a broader criminal law measure. The principal objection to the treble damage remedy had come from the American Bar Association's Antitrust Section, which—in the course of criticizing the commingling of antitrust concepts with criminal law enforcement goals—expressed particular concern that the antitrust requirements of "standing" and "proximate cause" would create "inappropriate and unnecessary obstacles" for persons seeking treble damages for injuries caused by organized crime activities. However, at the specific suggestion of the American Bar Association, the bill was amended in the House Judiciary Committee to include among its civil remedies a private right of action for treble damages. With this and other amendments, the bill was passed by the House, returned to the Senate, and accepted by that body without further ado.

The CHAIRMAN. Mr. Attorney General, do you not have all that written out?

Mr. TROTT. Yes, I have a lot of it written out.

The CHAIRMAN. Could that not go in the record?

Mr. TROTT. Mr. Chairman, maybe it would be simpler for you to ask questions of me in the interest of time.

The CHAIRMAN. Without objection, your entire statement will go in the record.

How important are the civil remedies under RICO as a supplement to the criminal provisions? Do private civil remedies, especially the treble damages provisions, serve an important role in Federal law enforcement?

Mr. TROTT. Mr. Chairman, from the beginning up until now, I think from our perspective private civil RICO has not had a significant impact on the organized crime problem in the United States. Criminal RICO sat silent for a long time before we learned how to use it. Now we know how to use it and, as I said earlier, it is probably our most important litigating tool in this battle. However I think the private attorney general concept, as of this date, has not borne the fruit expected of it by the authors of this statutory scheme.

This does not mean that this is not still a potential useful weapon in the war against organized crime, but so far it is clear that the impact has not been as substantial as was hoped early on.

The CHAIRMAN. Certain fundamental terms used in civil RICO cases, such as "enterprise" and "pattern of racketeering activities," have been interpreted to include numerous entities and wide ranges of behavior.

Are such terms too general, or do they provide the flexibility needed to fight various forms of fraud and racketeering activities?

Mr. TROTT. The criminal side itself is broad enough for us to use it against organized crime; except for two small areas where improvements could be made, we could not be happier with the way the statute is drawn with respect to its criminal application.

The CHAIRMAN. In other hearings and in testimony before the President's Organized Crime Commission, the Justice Department, and other witnesses have described new and emerging forms of organized crime, such as motorcycle gangs and oriental crime gangs.

Do private civil RICO suits have any value in these kinds of cases?

Mr. TROTT. Mr. Chairman, I would like to be able to tell you that they would.

Let me indicate that the private attorney general concept is somewhat limited when you compare it to the tools available to the Federal Government. Private litigants are at a disadvantage. And, just briefly, let me tick off some of those tools.

The Federal Government has access to the title III scheme that enables us, by electronic surveillance, to identify members of organized crime and gather evidence. We have the Witness Security Program which enables us to keep alive and protect the witnesses who come forth to testify against organized crime. We have the broad use of immunity powers to make people talk to us. We have the power of the FBI and Federal Government behind us, which has frequently been successful in warding off counterattacks of the kinds that organized crime has been using for years against witnesses and people who cause trouble. We have career prosecutors who spend a lifetime doing this, who are not compensated by private litigants. So it is not surprising to me that the private use of civil RICO has not had the impact against organized criminal organizations that was originally expected, although I continue to indicate that there are many people, as well as the author of the statute itself, who clearly believe that it will some day have this impact.

The CHAIRMAN. Mr. Attorney General, as you no doubt are aware, some business interests have proposed requiring a prior conviction as a precondition for bringing a private civil RICO suit.

In your statement, you mention some of the problems that such a change might create. Could you elaborate on this?

Mr. TROTT. Well, essentially, we are concerned, among other things, by the positioning that that might produce. I think that would cause undue pressure on the Department of Justice by private litigants searching for predicates for their civil lawsuits. Then we get into a position of approving or disapproving, in a sense, private lawsuits. And I believe that those kinds of determinations ought to be made without that type of threshold consideration.

The CHAIRMAN. We may have some other questions so we will submit for the record.

I have got to finish here in about 20, 25 minutes.

I want to thank you very much for your presence and for your testimony. And I think it has been very helpful.

Mr. TROTT. Thank you, Mr. Chairman.

[Prepared statement follows:]

Department of Justice

Statement of Assistant Attorney General
Stephen S. Trott

Mr. Chairman and Members of the Subcommittee, it is a pleasure to be here today to discuss the views of the Department of Justice on the RICO statutes as used by the government and, in the civil arena, by the private sector.

Some fifteen years ago, the Department supported RICO's enactment as a significant step forward in our efforts to reduce the influence that organized criminal groups exercise at all levels of society. Today, more than ever, we reaffirm that support. When applied correctly, RICO remains an exceptionally valuable law enforcement tool. In my statement today, I would first like to provide some general observations about RICO based on our own use and experience, including the procedures by which the Criminal Division controls and authorizes the filing of RICO cases initiated by the Department of Justice. I will suggest some possible improvements which I believe would increase RICO's effectiveness in criminal prosecutions. I will then address RICO's civil provisions, both in terms of governmental litigation and as used between private parties. It is no secret, of course, that the recent proliferation of private RICO suits in the federal courts has generated considerable discussion throughout the legal community. We understand and share the concern of those who believe that, to a significant extent, private civil RICO is not being used as originally intended, and we stand willing and ready to join in the effort to see what can be done to correct this situation.

I. CRIMINAL RICO

A. Introduction

As the Subcommittee knows, for several years after its enactment in 1970, RICO was used sparingly by federal prosecutors. By 1980, at the ripe old age of ten years (by which time perhaps as many as 250 RICO prosecutions had been initiated) RICO was still subject to widely contrasting interpretations and confusion in the courts, most notably in the definition and application of terms such as "enterprise," "pattern of racketeering," and "forfeiture."

In more recent years, however, use of RICO has dramatically increased as prosecutors and courts alike have become more familiar with the enterprise concept, and more knowledgeable of RICO's considerable strengths. By the end of 1984, federal prosecutors had brought more than 500 criminal RICO cases. Moreover, since 1980, the Criminal Division has asserted greater control of RICO prosecutions by requiring federal prosecutors to secure Criminal Division approval of RICO cases prior to indictment. The results, I am pleased to report, have been impressive. Indeed, it would take several hours to describe the significant RICO cases that have been brought in the past four years. Allow me instead to indicate statistically how our use of RICO has increased and briefly summarize a few particularly significant cases. The point, of course, is to underscore the need to preserve RICO as the leading statutory weapon against all forms of organized criminal conduct.

B. Number and Types of Cases

In 1981, the Criminal Division received some 71 requests for approval to initiate RICO prosecutions. In 1982, the number dipped slightly to 68. Although these figures suggest frequent use of RICO, I should note that there are 94 United States Attorney offices nationwide. Some of these offices did not have occasion to file RICO prosecutions in either year, whereas our offices in the large, metropolitan areas, such as Manhattan, Chicago, and Miami filed numerous RICO indictments. In 1983, the figure rose to 109, and in 1984 it rose again -- to 123.

These annual numbers by no means reflect the true magnitude of criminal RICO's importance, even in a statistical sense, since individual RICO cases typically include a number of defendants. To convey the impact of RICO prosecutions more accurately in this respect, I should note that, during the past two years, close to 400 defendants have been charged with RICO violations by the Organized Crime Drug Enforcement Task Forces alone.

With our increased emphasis on organized crime, public corruption, labor racketeering, infiltration of legitimate business, and on our most serious problem -- narcotics trafficking -- bigger, more complicated cases have been developed, utilizing sophisticated court-approved electronic surveillance, extensive undercover operations, and other similar investigative techniques. Such cases invariably develop evidence of large scale criminal operations, encompassing multiple and varied offenses, sometimes spanning five or more years, and involving a wide range of actors. These are the kinds of cases for which RICO was specifically designed.

Our analysis of the 1984 RICO requests indicates that narcotics offenses were the most frequent primary predicate crime charged, followed closely by acts involving official corruption (bribery). Mail and wire fraud, while far and away the most frequently alleged predicate activities in private civil RICO cases, were the primary activities only half as often as drug offenses and bribery in criminal RICO cases. We also found that while 47% of RICO prosecutions approved in 1984 alleged only federal crimes as predicate acts, 39% contained combined allegations of state and federal predicates, and 14% alleged only state predicates, such as murder, bribery of state officials, and arson. These figures reflect one of RICO's greatest virtues: it permits federal and state prosecutors, working together, to combine evidence of serious federal and state crimes into comprehensive prosecutions in order to strike at the heart of criminal cartels. (I should note parenthetically that the 1985 RICO approvals to date continue to reflect narcotics offenses, bribery, and murder as the most frequently recurring RICO predicates.)

C. Most Significant Cases

Statistics, of course, rarely provide the full picture. It is not the increase in the number of RICO cases that reflects increased effectiveness -- although the numbers do suggest an increased awareness by prosecutors of RICO's potential -- it is the outstanding quality of recent cases that demonstrates our effective application of RICO, both criminally and, most recently, civilly. Let me give you a few examples.

In 1984, the Court of Appeals for the Sixth Circuit upheld RICO-murder convictions of Cleveland's mob boss and several key lieutenants. All received lengthy prison sentences. Another federal jury in Cleveland thereafter convicted the remainder of Cleveland's mob leadership for RICO-murder and narcotics offenses, effectively removing the entire mob leadership from the streets of Cleveland.

RICO was used, of course, to convict New Orleans mob boss Carlos Marcello for bribery offenses. It was RICO that sent Los Angeles mob boss Dominic Phillip Brooklier and fellow racketeers to jail for extortion and murder, and RICO that provided the basis for convicting former Teamster president Roy Williams and Chicago mob members for a conspiracy to bribe a United States Senator.

The hierarchy of the Bonanno crime family of New York City was convicted of RICO-murder charges in 1982; also convicted of RICO-murder charges were leaders of the mob in Rochester, New York, on October 30, 1984. You may have read recently in the newspapers of the RICO-murder convictions in St. Louis of a group of union racketeers who engaged in a series of car bombings. Last week, the key defendants were sentenced to 55 years in prison. In fact, both the Cleveland and St. Louis cases, to name but two, involved murderous explosions on public highways.

In New York City, RICO indictments are pending against the leadership of the Colombo crime family, against the heads of the mob's five families (called the "Commission" case), against several significant leaders of the Genovese and Luchese crime families, against labor racketeers who allegedly controlled trucking at New York's JFK Airport, and finally, against 35 individuals who allegedly imported into the United States hundreds of millions of dollars worth of heroin from Europe.

In Boston, a RICO-murder case is pending against the leadership of Boston's mob family, the leader of which has been linked recently to currency violations involving the Bank of Boston.

In Kansas City, alleged leaders of both the Kansas City and Chicago syndicates are awaiting trial on RICO charges relating to skimming operations at Las Vegas casinos.

The collective impact of these cases against the mob is truly staggering and would have been unheard of five years ago.

Nor has RICO been limited to traditional organized crime. In Chicago, RICO was effectively used in Operation GREYLORD to convict corrupt local judges, lawyers, and policemen. In Louisiana, Governor Edwin Edwards is awaiting trial on RICO-mail fraud charges. In New York City, a RICO case is pending against Marc Rich, a fugitive, for an alleged hundred-million dollar oil miscertification scheme.

For the same reason that RICO has proved so effective against the mob, it has become an effective tool against domestic terrorism, as evidenced by two RICO indictments last month. A case in Seattle alleges that twenty-three members of "The Order" engaged in acts of terrorism and violence, including the murder of a well-known Denver radio personality. In Arkansas, a RICO indictment was filed against members of a neo-Nazi organization called "The Covenant, the Sword, and the Arm of the Lord" for alleged arson of religious buildings and an attempt to blow up a natural gas pipeline.

The above cases, while among our most dramatic, are by no means the only significant RICO achievements. The list literally goes on and on.

D. Departmental Control over RICO Prosecutions

But, while RICO remains both broad in scope and powerful in execution, I wish to emphasize our recognition that, for these very reasons, we have a special obligation to use the statute responsibly, and to stress the efforts we make to discharge that obligation. In September 1980, the Criminal Division promulgated written guidelines to all federal prosecutors governing RICO indictments. These guidelines, which have been most recently updated in March 1984, remain in effect today and are designed to: (1) weed out the ill-advised RICO case, (2) provide consistency in legal pleadings throughout all of the federal districts, and (3) encourage the teamwork between prosecutors and agents on the federal and state levels that the RICO approach to the "big case" invariably requires.

To secure approval to file a RICO indictment (or complaint in the case of civil RICO) the prosecutor -- usually an Assistant United States Attorney or an attorney assigned to the Criminal Division, such as a Strike Force attorney -- must submit a written request (called a prosecution memo) and a copy of a proposed indictment to our Organized Crime and Racketeering Section.

The prosecution memo identifies the defendants, summarizes the evidence, anticipates potential defenses or legal problems, describes proposed forfeitures or other special remedies, and articulates the prosecutor's justification for the use of RICO. The prosecution memo is reviewed by an experienced RICO staff reviewer and by at least one Deputy Chief of the Organized Crime Section. We independently assess the significance of the case and the sufficiency of the RICO count. We pay special attention, for example, to ensure in each case that the "pattern of racketeering" required under RICO involves two or more distinguishable criminal episodes. I mention this particular point because a frequent criticism of civil RICO cases filed by private plaintiffs is that the RICO complaint is predicated on a single fraud of a single victim carried out through multiple mailings.

No RICO indictment is approved until the Section is satisfied that the evidence as represented is sufficient to obtain a conviction, that the indictment is in proper form and consistent with similar RICO cases elsewhere in the country, that RICO is necessary to reflect adequately the nature and seriousness of the crimes charged, and that, when state crimes are proposed as RICO predicate acts, state authorities are either unlikely to proceed themselves or have requested the Department to prosecute the case, frequently in conjunction with their own prosecutors. For your convenience, a copy of our official RICO guidelines is attached to my statement.

E. Improvements in Criminal RICO

Having discussed our procedures and successes in RICO prosecutions, I would now like to briefly mention two areas where we can make improvements in criminal RICO. Before doing that, however, I should first acknowledge the steps recently taken by Congress to make the statute more effective. In recognition of RICO's value, Congress last session buttressed the statute in several important respects. Pornography and currency reporting offenses were added to the list of RICO predicates. The scope of RICO forfeiture was expanded by relating back the government's interest in forfeitable property to the date of offense. And more authority was provided for courts to issue pre-trial restraining orders. These latter two provisions help prevent defendants from avoiding forfeiture by disposing of their assets before conviction.

We have two suggestions for additional improvements. First, we strongly recommend that RICO be amended to include the forfeiture of substitute assets. At the present time, when a defendant is convicted of a RICO violation, the court must order forfeiture of any interests the defendant has acquired or maintained in the illegal enterprise, any property affording the defendant a source of influence over the illegal enterprise, and any proceeds the defendant has derived from the illegal activity. However, in many cases the property subject to forfeiture cannot be located, is beyond the jurisdiction of the court, or has been transferred to a third party. To meet these problems, the Department recommends that the RICO statute be amended to authorize the forfeiture of other property of the defendant up to the value of any property with which the subject has enriched himself but has dissipated or otherwise made unavailable. This provision would close a large loophole which undercuts the effectiveness of the criminal forfeiture statute.

The most common example of this situation occurs when drug dealers deposit proceeds from drug trafficking into offshore banks or use proceeds to purchase property outside of the United States. Such property is usually beyond the reach of the court. However, the defendant may have property or bank accounts within the United States which are not related to the racketeering activity. The substitute assets provision would allow the court to reach this property in lieu of the assets that the defendant has deliberately placed beyond the reach of the court.

Both legal theory and case law support this provision. Section 1963(c) provides that "all right, title, and interest in property ... vests in the United States upon the commission of the act giving rise to the forfeiture." Under this "relation back" doctrine, the property is forfeitable as of the time of the violation, even though the property would not be transferred to the government until after conviction. By taking post-violation steps that make forfeitable property unavailable to the court after conviction, a defendant deprives the United States of property to which it is entitled. Thus, if the defendant has other assets available, the government should be entitled to substitution.

A recent court ruling supports this rationale. In United States v. Conner, 752 F. 2d 566 (11th Cir. 1985), the court held that, when the forfeiture involves a specific sum of money, it acts as a money judgment against the defendant for the same amount of money which came into his hands illegally, regardless of whether the government has traced the path of the specific illegal funds. It matters not whether the government receives the identical money which the defendant received or other "substitute" money. While the Conner decision effectively applies the substitute assets concept to fungible items such as money, it does not cover all situations which may arise and does not remove the need for enacting the substitute assets provision.

A substitute assets provision was included in forfeiture legislation which three times passed the Senate in the 98th Congress. However, this provision was not included in the Comprehensive Crime Control Act of 1984. The Department believes strongly that this provision is important and that the justification for such a provision, in light of the Conner decision, has become compelling.

My second recommendation concerns the predicate acts relating to obstruction of justice. At the present time, Section 1503 of Title 18, the basic obstruction of justice statute, is a RICO predicate crime. However, in 1982, when the Victim and Witness Protection Act was enacted, all references to witnesses were removed from Section 1503 and new Sections 1512 and 1513 were enacted to provide greater protection for witnesses than did Section 1503. Unfortunately, Sections 1512 and 1513 were not added to the list of RICO predicates. As a result, serious criminal conduct, such as intimidating a witness, now covered in Section 1512, or retaliating against a witness, now covered in Section 1513, probably cannot be included as part of a RICO violation, even though it is clear that such conduct was intended to be included. Since it is uncertain whether such conduct can be prosecuted under Section 1503, we recommend that this anomaly be rectified by adding Sections 1512 and 1513 to the definition of "racketeering activity" in Section 1961(1) of Title 18.

I will now briefly discuss governmental use of civil RICO before moving to the private RICO controversy.

II. GOVERNMENTAL USE OF CIVIL RICO

A. Suits for Injunctions

Section 1964, the principal civil RICO provision, permits the district courts, upon application of the Attorney General, to enter appropriate orders to prevent and restrain violations of criminal RICO. This provision is designed to allow the United States to remove organized criminal influence from the business and financial communities. Naturally, prosecutors prefer, and are trained, to achieve this exorcism through criminal prosecutions that result in lengthy jail sentences, stiff fines, and forfeiture of criminal proceeds. Consequently, we have made very little use of civil RICO in the past. On only five occasions in the past fifteen years, by our research, has the Department filed a civil RICO action; of these five cases, only one merits comment, the recent Local 560 case in New Jersey, which is now pending appeal in the Third Circuit. We hope to build upon the legal principles established in Local 560, to produce similar cases in the future.

In United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), the government proved that mob members had continuously committed acts of murder, extortion, violence, and labor racketeering for twenty years as part of their effort to seize control of Teamster Local 560 in Union City, New Jersey. Despite repeated arrests, prosecutions, convictions, and even lengthy incarceration of these racketeers, they returned again and again to their union offices with appalling effrontery. At the time the RICO complaint was filed in 1982, these mobsters -- either directly or through friends and relatives -- utterly dominated the local's Executive Board, and had used their positions to gain access to union funds. As the district court put it, these "gangsters, aided and abetted by their relatives and sycophants, engaged in a multifaceted orgy of criminal activity."

Applying sanctions permitted by Section 1964, the court enjoined the defendants from further acts of racketeering, removed the entire Executive Board from their positions as trustees, created a temporary trusteeship for the union, and ordered a democratic election under governmental supervision following an eighteen month cooling off period. The granting of these extraordinary remedies, which the court described as the use of a judicial scalpel to remove a "malignancy," may well accomplish a goal that prosecutors once thought unattainable in a civil context, namely, the liberation of a large labor organization from the tentacles of organized crime.

The Local 560 case, in many ways, has opened our eyes to the potential of civil RICO. Over the years, the Department, as well as the Congress, has identified other labor organizations and legitimate businesses (for example, casinos) that have been or still are influenced to some degree by criminal groups. We are confident that the courts will continue to construe civil RICO liberally to help eradicate these influences and that future cases along the lines of Local 560 will be instituted.

B. Suits for Damages

Another governmental civil RICO case, to which the Department is not a party, bears comment. On April 5, 1985, the Federal Deposit Insurance Corporation (FDIC) filed a nine count complaint in Kansas charging several defendants with fraud in the collapse of the Indian Springs State Bank. The complaint includes a RICO count, which alleges mail and wire fraud as predicate acts of racketeering. The FDIC, suing both in its corporate capacity and in its capacity as receiver, is seeking over $16 million in actual damages, plus treble damages, plus $3 million in punitive damages.

I would like to make two points in this context. First, as you know, allegations of contract and program fraud, such as in the area of defense contracts, have been the subject of much concern expressed recently by federal agencies and much attention in the national media. Every federal agency is a potential victim -- a very rich victim I need not add -- of schemes that fit within one definition or another of fraud encompassed by the RICO statute. If the Department has one primary concern, it is that the RICO statute be used uniformly and wisely to preserve the advances that have been made through gradual and diligent effort.

I am confident that the FDIC suit, which is related to a joint investigation between the FDIC and our Organized Crime Section, is fully warranted. However, we believe that it is imperative for the future development of civil RICO that the approval of the Attorney General be obtained before federal agencies file civil RICO suits. We all know that bad cases result in bad law. Without the Attorney General's review of governmental RICO suits, it is conceivable that one agency of the government could proceed under a RICO theory, or seek a type of remedy, that is inconsistent with a position taken in some other case by the Department or another federal agency. As it is, the Department occasionally suffers an adverse judicial ineterpretation of RICO growing out of a private suit; it would hurt doubly if such a result occurred because the government itself could not agree on a uniform approach.

Second, Section 1964(c) of Title 18 provides that "any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor ... and shall recover threefold the damages he sustains." I am pleased to note that the Department of Justice last week filed in the Middle District of Florida the first civil RICO suit seeking treble damages on behalf of the United States as an injured "person." That suit seeks to recover more than $47 million from two businessmen and three companies previously convicted of criminal RICO and other offenses involving a massive fraud against the government in connection with the awarding of Department of Defense laundry contracts. This suit represents a major step forward in the Department's effort to use effectively the powerful civil provisions of RICO in appropriate cases. However, the success of this suit will depend on the courts' upholding our view that the federal government is a "person" as defined in Section 1961(3) of the RICO statute. Since RICO specifically authorizes the Attorney General to bring suits for injunctive relief, the statute's failure to expressly refer to the Attorney General in the treble damages section raises an arguable inference that RICO presently does not provide for treble damage recovery by the federal government.

We believe that the statute should be amended to explicitly allow the United States to file damage suits for injuries suffered by it as a direct result of RICO violations. The government already has authority to sue for injunctive relief on behalf of others and, presumably, on its own behalf as well. Thus, it would be anomalous to deny it the right to sue for demages when the United States has been injured by a RICO violation. Such suits could provide a particularly valuable method of protecting the public treasury from fraudulent misuse of federal funds. Damage suits by the United States would make possible the recovery of federal funds -- provided either through government programs or government contracts --that have been fraudulently obtained or misused, as well as the recovery of other losses suffered by the government, such as in the FDIC case.

The option to sue under such a provision would provide other benefits as well. For example, the possibility of recovering treble damages under RICO might make litigation worthwhile in situations in which the recovery of actual damages only might not be cost effective. Second, the possibility of a treble action suit by the government would have a significant deterrent effect on persons contemplating the fraudulent acquisition or misuse of government funds. With all of the recent revelations of possible fraud in the area of government contracts, such added deterrence would certainly be welcome. In this connection, it is important to remember that the federal interest in an effective effort against organized, systematic illegality -- whether manifested by fraud against the government or other conduct detrimental to the interests of the United States -- is, in essence, an interest in a result. There is no apparent reason for limiting the government to the use of criminal prosecutions or civil injunction actions to achieve that result.

If the government were authorized to bring treble damage actions, the measure of such damages should be treble the loss that the government suffered as a result of the acts which gave rise to the RICO violation. For example, if a person obtained $1 million from a government program under false pretenses, constituting a RICO violation, the amount of damages should be three times $1 million. The important point is that there should be no requirement of a separate "racketeering" injury such as the Second Circuit Court of Appeals has imposed in Sedima S.P.R.L. v. Imrex Co., 741 F. 2d 482 (2d Cir. 1984) cert. granted, 105 S.Ct. 901 (1985). The damages should be based on the actual amount of damages proven by the government.

Adoption of this proposal could provide significant benefits to the government, and substantially enhance the deterrent impact of civil RICO. At the same time, because the Department would be screening and controlling these cases, there would be no basis for criticisms such as are now being generated by irresponsible uses of the civil RICO statute by private plaintiffs.

III. USE OF CIVIL RICO BY PRIVATE LITIGANTS

A. Introduction

In the few years since the plaintiff's bar discovered the attractiveness of RICO's private civil remedy, private RICO suits have generated considerable controversy among litigants and courts. This controversy has led to growing pressure for statutory changes, and a number of specific proposals have been advanced that would modify the private right of action to prevent abusive litigation. We agree that there is a need to address this problem, but express no preference at this time for any of the particular approaches or specific proposals that have been put forward. We will be pleased to address these matters at a future date, however, if the Committee wishes.

At this point -- the outset of the Committee's inquiry -- we think it may be most helpful to attempt to place in perspective the major questions that have arisen regarding private uses of civil RICO. To that end, I propose in this section of my statement to review briefly the history and current applicability of the private remedy provision, to describe the findings of a Department of Justice study of reported private civil RICO litigation, to summarize the debate over private uses of the statute, to identify the fundamental issues that we believe are raised by that debate, to discuss the interests of the government that seem to us to bear upon the resolution of those issues, and to summarize the range of options available to the Committee regarding the future of private civil RICO enforcement, commenting briefly on some of the apparent advantages and disadvantages of the major possible approaches.

B. Private Civil RICO's History and Application

As I have already mentioned, RICO's private civil remedy permits a person who has been injured in his business or property by reason of a violation of section 1962 to sue for treble damages. He may also recover the cost of suit, including a reasonable attorney's fee.

At the outset, we think it is important to place this provision in context -- not only in the context of the RICO statute, but also in the context of the far broader legislative undertaking of which that statute itself was only a part. As you recall, RICO was enacted as title IX of the Organized Crime Control Act of 1970, the purpose of which was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." First among the factors recited by Congress as providing the impetus for the Organized Crime Control Act was the finding that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually draws billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."

RICO itself was aimed at one particular area of organized criminal activity -- the increasing use of power and money obtained from illegal activities to infiltrate and corrupt legitimate businesses, labor unions, and other enterprises. However, rather than attempting the futile and probably unconstitutional exercise of defining and outlawing "organized crime", Congress deliberately chose to focus on the types of conduct characteristic of persons engaged in organized crime. In doing so, Congress rejected criticisms that the legislation was too broad and would reach beyond organized crime. As Senator McClellan, the principal Senate sponsor of the legislation, put it: "It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." In a similar vein, Congressman Poff, the principal House sponsor, stated: "[E]very effort was made to produce a strong and effective tool with which to combat organized crime -- and at the same time deal fairly with all who might be affected by...[the] legislation -- whether part of the crime syndicate or not."

RICO's provision of a private treble damage remedy was a late addition to the statute. Two of the predecessor bills had included such a remedy, but that provision was dropped in the process of the Senate's conversion of the legislation from an antitrust form of statute to a broader, criminal law measure. The principal objection to the treble damage remedy had come from the American Bar Association's Antitrust Section, which -- in the course of criticizing the comingling of antitrust concepts with criminal law enforcement goals -- expressed particular concern that the antitrust requirements of "standing" and "proximate cause" would create "inappropriate and unnecessary obstacles" for persons seeking treble damages for injuries caused by organized crime activities. However, at the specific suggestion of the American Bar Association, the bill was amended in the House Judiciary Committee to include among its civil remedies a private right of action for treble damages. With this and other amendments, the bill was passed by the House, returned to the Senate, and accepted by that body without further ado.

In enacting RICO, Congress declared that "[t]he provisions of this title...shall be liberally construed to effectuate its remedial purposes." Given this mandate, as well as the broad purpose and language of RICO, federal courts have generally interpreted the statute quite liberally in criminal cases, but in private civil cases some courts have been reluctant to construe RICO as expansively as its terms seem to permit. Initially, district courts sought to limit the availability of the treble damage remedy by construing the statute to require allegations that the defendant was affiliated with organized crime or that the plaintiff had suffered a "competitive injury". However, following the Supreme Court's reminder in United States v. Turkette, 452 U.S. 576, 587 (1981), that Congress had specified that RICO's provisions were to be construed liberally to effectuate the statute's remedial purposes, the courts of appeals consistently rejected these and similarly crabbed interpretations. Then, in the summer of 1984, the Court of Appeals for the Second Circuit rendered a series of three decisions that once more severely restricted the broad applicability of civil RICO.

In Sedima S.P.R.L. v. Imrex Co., 741, F.2d 482 (2d Cir. 1984), the leading case in the Second Circuit trilogy, the court held that a private RICO plaintiff must show both that the defendant has been convicted of the predicate acts of racketeering on which the suit is based, and that the plaintiff suffered some form of "racketeering injury" beyond the direct injury caused by the predicate offenses themselves. The prior conviction requirement had previously been rejected by the Sixth Circuit, as had the "racketeering injury" limitation by the Seventh Circuit. Subsequent to Sedima, the Seventh Circuit, in Haroco, Inc. v. American National Bank and Trust Company of Chicago, 747 F.2d 384 (7th Cir. 1984), reexamined the "racketeering injury" requirement in the light of the Second Circuit cases, and expressly decided to follow its earlier decision rather than the Second Circuit decisions. We expect that this conflict among the circuits will be resolved in the near future by the Supreme Court, which has granted petitions for certiorari and recently heard arguments in both Sedima and Haroco.

As matters now stand, except in the Second Circuit, where its potential utility to private plaintiffs had been drastically curtailed, RICO offers private plaintiffs a very attractive remedy for a wide range of unlawful conduct, including conduct bearing little resemblance to organized crime activity in the traditional sense. Apart from the prospect it holds for treble damages and attorney's fees, the statute provides ready access to federal courts -- with their liberal procedures governing such matters as service of process and discovery -- to plaintiffs whose claims would otherwise not merit federal attention at all or would be cognizable only upon compliance with strict standing or other procedural requirements.

RICO's availability in such cases results from the conjunction of two factors: the inclusion of various forms of fraud in its definition of "racketeering activity", and the ease with which the statutorily required "pattern of racketeering activity" can be derived from what is essentially a single fraudulent scheme, executed in a manner that twice gives rise to federal jurisdiction. These factors make it possible, for example, for a plaintiff involved in an ordinary commercial dispute to seek recovery under RICO by alleging a scheme to defraud on the part of his adversary, the involvement of an "enterprise" in the scheme, and the mailing of two letters or the making of two telephone calls for the purpose of carrying out the scheme. Similarly, in the securities area, a RICO claim can be brought against an organization on the basis of a single allegedly fraudulent sale of securities effected by means of two filings, mailings, or telephone calls. In other words, RICO makes it possible to seek treble damages in virtually every case of commercial mail or wire fraud committed by or through an organization, and in many securities fraud cases as well.

C. Department of Justice Study of Private Civil RICO Litigation

In an effort to obtain data concerning the actual use of RICO's private civil remedy, the Department of Justice has attempted to locate and analyze the reported judicial decisions in private civil RICO suits. The following statistics reflect the data available to the Department through the end of 1984.

Approximately 230 decisions in private RICO suits were found to have been reported. By comparison, during the same period there were 16 published decisions in civil RICO proceedings initiated by governments -- 5 in injunction cases brought by the federal government, and 11 in damage suits brought by state or local governments.

As mentioned above, the federal government has also commenced more than 500 criminal prosecutions under RICO since the statute was enacted. Roughly half of these criminal cases has resulted in published decisions. If the same ratio of total cases filed to total published decisions is applied with respect to private civil cases, the actual number of private actions filed to date is probably close to 500.

The number of published opinions rendered annually in private civil RICO actions has been increasing steadily -- from 1 in 1978, to 2 in 1979, to 6 in 1980, to 18 in 1981, to 40 in 1982, to 68 in 1983, to 97 in 1984.

About two thirds of the reported private RICO suits have been predicated on mail fraud, wire fraud, or fraud in the sale of securities. Roughly seven percent appear to have been brought against organized crime figures or on the basis of violent or other non-fraudulent conduct common to organized crime (e.g., murder, arson, extortion, organized theft, public corruption, obstruction of justice, labor racketeering).

Of the 123 cases for which data are available, 58 percent involved either multiple criminal episodes or multiple victims, while 42 percent were based on a single episode having only one victim.

In approximately 65 percent of the private cases for which data are available, the conduct complained of formed the basis for a federal cause of action other than the RICO claim. With respect to RICO cases based on fraud, 51 percent could have been predicated on non-RICO grounds.

Ten percent of the reported private actions were brought following some sort of federal, state, or local government action against the defendant. About half of the prior government actions had resulted in criminal convictions.

Of the 163 private cases for which disposition information could be found, 61 percent were decided in favor of defendants prior to trial. Very few private suits appear to have resulted in judgment for the plaintiff after trial.

Data are not available concerning the number of private suits that have been settled or the amounts of the settlements.

The Department's study of reported private RICO cases suggests several conclusions that may be important in considering the future of civil RICO.

First: Solely in terms of numbers of cases, the use of RICO's criminal provisions far outweighs the use of its civil provisions in the fight against organized crime.

Second: Although civil RICO filings have grown rapidly, the total number of private civil RICO suits brought in recent years constitutes less than half of one percent of the total annual federal civil caseload attributable to private litigation, and a majority of these cases could have been brought in the federal courts even if RICO's private remedy had been unavailable.

Third: While private RICO actions have been predicated most frequently on allegations of fraud, a not insignificant number have involved types of criminal activities that the statute was more clearly intended to prevent.

Fourth: Although plaintiffs who bring private civil RICO suits on the basis of only one criminal episode are in the minority, this practice is common enough to warrant concern that the purpose of the statute's "pattern" requirement -- to limit RICO to ongoing criminal activity -- is not being fully realized.

Fifth: The difficulty of assessing the probable long-term effects of private civil RICO actions is compounded by the fact that a substantial majority of reported private suits has been decided favorably to the defendants prior to trial, and the fact that settlement data are unavailable concerning both reported and unreported cases.

Sixth: With the notable exception of the Local 560 case which I discussed earlier, neither the use of RICO's injunction provisions by the federal government nor the use of its damage remedy by state and local governments has been a significant factor in the fight against traditional organized crime, either directly or as a spur to private civil enforcement.

D. The Debate over Private Civil RICO

It has generally been recognized that RICO was intended to provide new and more effective weapons with which to combat organized crime, and that the use of these weapons could have a potentially far-reaching impact. Initial concern over the scope of the statute focused on the potential for prosecutorial abuse.

We believe that any basis for that concern has been eliminated by the Department's adoption of strict guidelines regarding the use of RICO in criminal prosecutions. However, no comparable voluntary restrictions on the exercise of discretion exist -- or can exist -- with respect to private civil litigation under RICO, and the courts have generally acknowledged the inappropriateness and difficulty of imposing any such limitations in the guise of statutory interpretations. The consequent proliferation of private civil RICO cases arising out of commercial disputes and alleging fraud on the part of otherwise respectable businessmen has prompted growing objections to the statute.

The first major point made by critics of private civil RICO is that the statute has not been used for the principal purpose for which it was adopted -- to assist in deterring infiltration by organized crime into legitimate business. In support of this argument it is pointed out that very few civil RICO cases have been filed against organized crime; instead, the vast majority has been brought against legitimate businesses. Thus, the argument goes, private civil RICO has simply not provided the additional measure of deterrence to organized crime activity that Congress hoped it would.

The second principal criticism of private civil RICO is that its use primarily as a remedy for fraud has resulted in the unnecessary and unwise federalization of an area of law that should be reserved to the states. On the question of necessity, civil RICO's opponents argue that Congress never explicitly considered the need for a federal fraud remedy and that no such remedy is necessary in any event, given the fact that federal and state statutes make serious fraud a crime, federal laws afford civil redress for securities frauds, and state laws permit recovery for other types of fraud. With respect to the wisdom of a federal fraud remedy, it is claimed that -- in the absence of a compelling need for a federal remedy -- it is inconsistent with the nation's constitutional principles to federalize an area of the law that has traditionally been a matter for state concern. In addition, the argument goes, federalization of state fraud cases imposes inappropriate burdens on the federal courts.

In addition to questioning the need for private civil RICO as a general federal fraud remedy, critics cite a number of problems that they say have been caused by the increasing use of the statute for this purpose. First, because RICO is generally perceived as a statute directed against organized crime (as the "racketeering" title emphasizes), it is claimed that the use of civil RICO against legitimate businesses tars them with an association that is often unfair. Furthermore, it is argued, the stigma of a "rackeetering" complaint subjects legitimate businesses to undue coercion to settle frivoulous RICO claims, and places them at a significant disadvantage in defending against such claims.

Second, critics contend that private civil RICO has skewed the normal dispute resolution process in many ordinary commercial cases. This has occurred, it is claimed, because of the attraction of the treble damages remedy, the availability of the statute in every commercial lawsuit in which fraud could conceivably be alleged (including securities actions and suits involving otherwise straight-forward contract claims), and the consequent increase in litigation costs (both procedural costs and increased settlement costs).

Third, many critics have argued that the growing use of private civil RICO in the securities area has undermined the carefully crafted set of federal remedies and procedures specifically designed to deter and redress securities violations.

Finally, critics of private civil RICO point out that inappropriate cases are being filed with increasing frequency, and warn that the adverse consequences to legitimate businesses and the federal courts will become far more burdensome as more and more imaginative plaintiffs, and plaintiff's attorneys, seek to avail themselves of the statute's generous remedies.

Defenders of private civil RICO suits begin by arguing that even small numbers of private actions are helpful in the fight against organized crime, and that the threat of such actions adds to the statute's overall deterrent effect. Moreover, it is argued, the number of private suits against organized crime members and activities is likely to grow in the wake of federal prosecutions and injunctive actions that demonstrate the vulnerability of organized crime groups to counterattacks by state governments and other institutional plaintiffs, as well as by individuals.

Second, supporters of civil RICO contend that there exists a heightened concern about the pervasive pattern of fraud in the United States, and that private RICO suits are beneficial in addressing that problem. It is neither unfair nor unwise, according to this argument, to allow the use of civil RICO against apparently legitimate defendants who regularly resort to criminal fraud in the operation of their businesses. In this connection, it is claimed that existing provisions of law are adequate to prevent abusive litigation, and that -- in fact -- legitimate businessmen who are subjected to frivolous RICO suits are often so outraged that they refuse even to consider settlement. Moreover, it is pointed out, the vast majority of private RICO suits has been disposed of at the complaint stage, usually in favor of defendants, and there is no way of telling how many claims will be found to be meritorious when plaintiffs are put to their proof.

Last, defenders of civil RICO point out that private RICO suits based on fraud are sufficiently dissimilar in their elements from fraud actions under state or other federal laws to warrant their resolution in the federal courts, and that -- since

RICO is not the sole federal jurisdictional predicate for most of these suits -- their current and potential burden on the federal courts has been exaggerated.

In short, the defenders of private civil RICO argue that private suits have considerable actual and potential utility, that their short-term consequences are not as alarming as some critics claim, and that, therefore, it would be premature to impose substantial restrictions on private uses of the statute.

E. Fundamental Issues to be Addressed

In a recent speech, the Chairman of this Committee identified seven issues that he expected would be addressed in the course of these hearings: (1) how to provide strong remedies for victims of organized crime without creating weapons to be used by one business competitor against another; (2) whether there is a need for change in RICO's predicate offenses, including greater specificity with respect to offenses that are described in general terms; (3) whether a prior criminal conviction should be required before a private suit may be brought; (4) whether equitable remedies should be available to private claimants; (5) how best to protect the prerogatives of the states in this area; (6) what burden of proof should be applied in civil RICO suits; and (7) whether organized crime involvement should be required as an element of proof.

Generally, these questions reflect the major criticisms that have been directed at private civil RICO, as well as the principal proposals for limiting the scope of the statute. As such, they will, of course, have to be addressed by the Committee. However, we believe that, before reaching these rather specific questions, it is necessary to confront two fundamental issues, the resolution of which is likely to influence the answers to the more particular questions.

The first basic issue is whether RICO should include any civil enforcement component at all. If it should, the second fundamental issue is whether that component should include a broad, general remedy for fraud as well as other offenses, or whether it should be focused only on the more violent types of organized, systematic illegality with which the sponsors of the statute were primarily concerned.

F. Government Interests to be Considered

In our view, the development of a sound position concerning the appropriate future of private civil RICO requires recognition and accommodation of a variety of governmental interests -- some fairly specific, others of a broader nature. Some of the more specific interests have already been alluded to. The broader interests of the government include: assuring an effective remedy against large-scale, continuing organized criminal activities; observing sound principles of federalism; avoiding unnecessary burdens on the federal civil justice system; and assuring the fair operation of the federal civil justice system. Each of these interests warrants brief comment.

Large organized crime and racketeering ventures inevitably infiltrate or otherwise affect the nation's legitimate business and economic structures. For this reason, they are generally recognized as presenting the single most serious challenge to the maintenance of a free and democratic society. No matter what particular crimes are committed by these ventures to accumulate or extend their wealth and influence, it is their acquisition of legitimate facades that aggravates the problem, and it is their scale of activity and their organized nature that perpetuates it. Moreover, the operation of such enterprises not only depends upon the direct and indirect commission of numerous crimes, but it is otherwise criminogenic. The example of criminal enterprises, and also supposedly legitimate enterprises, routinely operating by means of kickbacks, bribes, persistent frauds, and other kinds of illegal conduct, is infectious. The attitude develops that, since "everybody does it", it makes no sense for a small business or an individual to try to succeed solely by honest means. The result is widespread public cynicism, and an overall erosion of deterrence.

Assuring an effective remedy against this particularly corrosive form of crime should, therefore, be considered the principal governmental interest to be kept in mind in assessing civil RICO issues. Two aspects of this interest have already been discussed -- maintaining and enhancing the effectiveness of criminal RICO, and strengthening civil RICO by permitting government suits for damages. A third aspect -- encouraging supplementary private initiatives to enforce RICO's prohibitions -- also deserves consideration.

The attention that federal investigators and prosecutors can focus on crime -- even on large-scale organized crime -- is limited. Only a small percentage of suspected activities can be investigated thoroughly, and only a fraction of those investigated can be effectively prosecuted. It was in recognition of these practical limitations that Congress elected to augment governmental efforts against organized crime by encouraging private initiatives. Whether or not the potential of that approach has been realized in any significant degree over the few years that private civil RICO suits have been tested, the strategy of supplementing governmental activity with private initiatives is itself a matter of legitimate federal interest.

The second broad interest of the government that should be kept in mind is the obvious governmental interest in adhering to sound principles of federalism -- leaving to the states all matters for which there is not a persuasive and constitutionally justifiable reason for federal involvement. With regard to providing federal criminal law jurisdiction over activities of large-scale organized criminal enterprises, the issue appears to have been worked out, over a course of decades, to the general satisfaction of most state and federal authorities. The same cannot be said, however, concerning the reach of federal civil jurisdiction. Prior to 1970, federal courts were not permitted to entertain private civil suits against organized crime, absent the meeting of independent jurisdictional requirements. Although Congress elected to open the door to such suits in 1970, it remains a legitimate question whether an adequate philosophical foundation was presented in justification of the extension of civil jurisdiction.

As to cases alleging traditional forms of organized crime activities, the national effect of those collective activities, and the desirability of augmenting limited federal enforcement resources with private initiatives, may provide sufficient justification for continued acceptance of the statutory expansion of federal civil jurisdiction. As to cases alleging predicate acts of a fraudulent nature, however, there is a greater question whether the extension accords with principles of federalism; certainly, if Congress initially had provided only a simple fraud remedy, the justification for the extension of federal jurisdiction might have been considered dubious. Still, since the remedy adopted provides for recovery of treble damages and attorney's fees rather than simply actual damages, the statute's design appears clearly to accord with its purpose of providing a special incentive to private initiatives that supplement the government's efforts against organized crime. The private action serves, in effect, as a punishment mechanism as well as a recovery mechanism. As such, it may be viewed as somewhat more deserving of the extension of federal jurisdiction than it would have been were it designed simply to provide a means of private redress.

In any event, we think that the interests of federalism should be re-examined independently in assessing the various options for changing the statute.

Closely related to the governmental interest in maintaining sound principles of federalism, is the governmental interest in assuring that the federal judiciary is not unduly burdened by an influx of civil cases that might otherwise be presented, if at all, in state courts. This interest, like some others, competes with that of assuring effective remedies against organized crime. The issue is one of balancing the judicial burden of civil RICO's private suits against its law enforcement value. In assessing the weight of this burden, it is important to bear in mind the results of the Department's study indicating that most civil RICO cases could have been brought in federal courts on other grounds. Of course, some of those cases probably would not have been filed on alternate grounds absent the lure, and the settlement inducing value, of potential treble damage recoveries. Nevertheless, this finding, among others, suggests that the burden of private RICO suits on the judiciary is not a particularly heavy one.

Finally, the government has a clear interest in assuring the fair operation of the federal civil justice system. That interest encompasses concern that the system provide evenhanded treatment of all parties in individual cases, and concern that federal remedies not be used in a manner that undermines carefully constructed regulatory systems.

The governmental interest in assuring that the civil justice system is not weighted unfairly in favor of one litigant over another requires serious attention to the claim that the civil RICO provisions, in effect, provide plaintiffs with tempting opportunities to coerce defendants into settlements based on matters extrinsic to the merits of the case. There is also an equally legitimate basis for concern that a reputable enterprise charged as a defendant may elect quietly to settle a case out of court rather than risk the chance of being adjudged a "racketeer." Certainly there is also a legitimate basis for concern that the prospect of liability for three times the actual damages might prompt such a defendant to settle a case rather than risk adjudication of a charge against which it believes it has a meritorious, but arguable, defense. While liability for treble damages under a civil racketeering statute does not seem an inappropriate consequence in any well-founded case, the question arises whether, as drafted, the statute invites abusive use -- particularly in cases involving a single, uncharacteristic instance of fraud on the part of an otherwise legitimate corporation.

There is also a plain government interest in assuring that a carefully crafted regulatory scheme, designed to control the operations of a particular industry, not be undermined by the unwitting creation of a means of circumventing that scheme. Certainly, if relatively routine securities violations are being used as predicates for private civil RICO actions, the system for regulating securities markets is being evaded in a manner that was not contemplated by the Congress.

G. Range of Major Options Available to Congress

In its consideration of the future of private civil RICO, Congress will undoubtedly want to examine a number of options. The major possibilities range from maintaining the status quo to abolishing the private right of action entirely. Between these extremes lie a variety of intermediate alternatives. Some of these involve amendments that would preserve private civil RICO enforcement, while making clarifying modifications in statutory language to restrict the statute's availability in private suits based on fraud. Others involve more far-reaching statutory changes -- changes that would substantially restrict private civil actions of all types. Because we recognize the desirability of some change, and because the debate to date has focused on alternatives short of abolishing the private right of action, it may be helpful to make a few general observations about some of these intermediate approaches.

Three clarifying changes might be made in response to inappropriate use of the predicate acts of mail fraud, wire fraud, and fraud in the sale of securities.

The first would be to define the term "fraud in the sale of securities" to make it clear that the term covers only criminal fraud in the sale or other disposition of securities, rather than all possible violations of the federal securities laws, or of the rules and regulations issued thereunder. The second clarifying change in this area would be to define the term "pattern of racketeering activity" in a manner that precludes private suits based on a single criminal episode or transaction, with only one victim. Such suits are now possible because -- due to the peculiar manner in which the federal mail fraud and wire fraud statutes are drafted -- each use of the mails or of a telephone pursuant to a scheme to defraud constitutes a separate offense for purposes of establishing a "pattern of racketeering activity." Third, language could be added to the statute to provide that -- at least in private suits based on fraud -- the plaintiff must prove his case by clear and convincing evidence, as opposed to the usual standard for recovery in civil cases -- proof by a preponderance of the evidence.

As a group, these changes would seem to be responsive to legitimate concerns that the statute unfairly subjects reputable businessmen to unwarranted consequences merely because they may have committed isolated or sporadic criminal acts in the otherwise legitimate conduct of their businesses. At the same time, however, these changes would permit continued use of the statute by private plaintiffs against systematic, continuing illegal acts committed by or through legitimate, as well as illegitimate, business enterprises.

Amendments that would impose more substantial limitations on private civil suits include deletion of mail fraud, wire fraud, and fraud in the sale of securities from the definition of "racketeering activity"; preclusion of private suits based on types of conduct that are actionable under other provisions of law; imposition of a prior criminal conviction requirement; and limitation of recovery solely to cases involving "racketeering injury", i.e., injury other than that caused by the predicate acts underlying the section 1962 violation.

All or most of these more far-reaching amendments appear to share certain characteristics. First, they would all reduce substantially the ability of private plaintiffs to bring RICO suits for damages arising out of ordinary commercial transactions with ostensibly reputable business organizations. Second, although it appears that the problem posed by private RICO suits is inappropriate use of civil RICO in what would normally be considered ordinary fraud cases, these "solutions" are not limited to such cases; they would apply to all private RICO suits. Third, each of these amendments would have the effect of curtailing -- if not virtually eliminating -- private suits and, to that extent, of reducing whatever deterrent potential private enforcement might otherwise add to the deterrence achieved by criminal prosecutions. Finally, most of these changes could also make it more difficult for the government to avail itself of civil RICO's equitable remedies.

H. Conclusions

When the Congress enacted RICO, the sponsors expected that private civil suits would provide a significant deterrent to organized and systematic criminal infiltration and misuse of legitimate enterprises. At the same time, they realized that a possible result of the broadly drafted statute would be its use against other types of defendants and activities. Experience has shown, however, that the instances of private civil RICO's use against traditional organized criminal activities are far outweighed by examples of its application as a general federal anti-fraud remedy against seemingly reputable businessmen.

The development of private civil RICO enforcement in this fashion has had two principal consequences. The first -- and more serious from our point of view, because it directly affects the law enforcement interests of the Department -- is that the potential of private enforcement as a deterrent to structured and continuing criminal activity has not been fully realized. The first question the Committeee must face, therefore, is whether the apparent failure so far to achieve RICO's potential as a weapon against organized crime warrants abandonment of the original Congressional strategy of using a combination of criminal prosecutions and civil actions to deter and punish or redress organized, systematic illegality.

In this connection, it is true, of course, that the deterrent value of private civil RICO enforcement does not seem very significant when judged in terms of the number of private actions that have been brought against known or suspected members of organized crime. On the other hand, in gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed. Furthermore, as the federal government's enforcement efforts continue to weaken organized crime and dispel the myth of invulnerability that has long surrounded and protected its members, private plaintiffs may become more willing to pursue RICO's attractive civil remedies in organized crime contexts. It should be remembered, too, that civil RICO has significant deterrent potential when used by institutional plaintiffs, such as units of state and local governments, which are not likely to be intimidated at the prospect of suing organized crime members. Finally, civil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in area of the organized criminality may have had a greater deterrent impact than is commonly recognized, and that both the threat and the actuality of private enforcement might be expected to produce even greater deterrence in the future.

If the Committee concludes that private enforcement of RICO's prohibitions should be continued as a supplement to government enforcement, it must consider the second major consequence of civil RICO's transformation into a federal anti-fraud remedy -- the burdens that private civil RICO actions have imposed on legitimate businessmen, on the federal courts, and on the federal civil justice system. Analysis of the available evidence seems to suggest that the collective weight of these burdens may not be as great as is claimed, and that the burdens in individual cases may be balanced by the social value of the remedy's availability against large-scale, systematic illegality. If its inquiry confirms these tentative conclusions, then the Committee may wish to limit changes in the private right of action to statutory clarifications designed to reduce the likelihood of misuses in the area of principal concern -- actions predicated on an event involving ordinary fraud. If, on the other hand the testimony presented to the Committee demonstrates that the actual or potential burdens of private suits significantly outweigh their benefits, then the Committee may wish to consider imposing more substantial limitations on the statute's private right of action.

IV. CONCLUSION

As I stated earlier, we do not at this time endorse any of the suggested changes in private civil RICO. Nevertheless, we recognize that failure to confine private RICO actions within reasonable bounds may not only be unfair to defendants and unduly burdensome for the federal courts, but may also encourage judicial interpretations in civil suits that could have adverse consequences for the government's enforcement efforts. We are ready, therefore, to work with the Committee as it considers the need for legislative change, on the understanding that this will be done in the context of preserving -- and, we hope, strengthening -- the RICO statute for use by the government in criminal and civil cases brought to eradicate organized, systematic illegality.

I appreciate the opportunity to share our thoughts on this important statute with you today. Thank you very much.

9-110.200 RICO GUIDELINES - PREFACE

The decision to institute a Federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other Federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.

Despite the broad statutory language of RICO and the legislative intent that the statute "... shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed - the infiltration of organized crime into the nation's economy.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative perogratives of the Department of Justice.

9-110.210 Authorization of Prosecution: The Review Process.

Effective September 15, 1980, the review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section. To commence the review process, a final draft of the proposed indictment and a prosecutive memorandum shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. The guidelines provide detailed guidance for the use of RICO charges in criminal investigations and prosecutions, as well as in all civil applications of RICO. Attorneys are, however, encouraged to seek guidance from the Organized Crime and Racketeering Section, telephonically or by letter, prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review. Communication with the Organized Crime and Racketeering Section well in advance of indictment may result in the resolution of problems with a proposed RICO indictment and effect an expeditious review.

The submitting attorney must anticipate that the RICO review process, which is handled on a first-in-first-out basis, is a time consuming process, in which the reviewer has no control over the number of cases submitted for review during a given time frame. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. Unless there is a backlog, 15 working days is usually sufficient. The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the Grand Jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the Clerk of the Court shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecutive memorandum at a later date.

9-110.211 Duties of the Submitting Attorney

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the Grand Jury, the Section shall be notified in writing of any significant rulings which have an impact upon the RICO statute. For example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the United States Attorney as well as the defense should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The Government's briefs and motions will provide assistance to other United States Attorneys' offices handling similar RICO matters.

Once a verdict has been obtained, the United States Attorney should forward the following information to the Organized Crime and Racketeering Section for retention: (a) the verdict on each count of the indictment, (b) a copy of the judgment of forfeiture, (c) estimated value of the forfeiture, (d) judgment and sentence(s) received by each RICO defendant.

9-110.300 RICO Specific Guidelines

9-110.310 Except As Hereafter Provided, The Attorney For The Government Should Seek Authorization For An Indictment Charging A RICO Violation, Only If In His Judgment, Those Charges:

A. Are necessary to ensure that the indictment:

(1) adequately reflects the nature and extent of the criminal conduct involved; and

(2) provides the basis for an appropriate sentence under all the circumstances of the case; or

B. Are necessary for a successful prosecution of the Government's case against the defendant or a co-defendant; or

C. Provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

9-110.311 Commentary: All-encompassing examples are difficult, if not impossible to formulate when discussing RICO; however, by way of illustration only:

(a) When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;

(b) When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;

(c) When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as: prior similar acts, continuing crime or conspiracy), a RICO count may be appropriate;

(d) When a substantial prosecutive interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which he has acquired, maintained, operated or conducted in violation of 18 U.S.C. § 1962, RICO may be appropriate.

9-110.320 No Criminal Or Civil Prosecution Or Civil Investigative Demand Shall Be Commenced Or Issued Under The RICO Statute Without The Prior Approval Of The Organized Crime And Racketeering Section, Criminal Division.

9-110.321 Commentary: It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the Section of the Criminal Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Box 571, Ben Franklin Station, Washington, D.C. 20044 at least 15 working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, as authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.

In addition to the above considerations, the use of RICO in a prosecution is also governed by the Principles of Federal Prosecution (July 1980). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the Principles of Federal Prosecution.

9-110.330 A RICO Count Of An Indictment Will Not Be Charged Where The Predicate Acts Consist Solely And Only Of State Offenses Except In the Following Circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the Federal Government has significant interest;

B. Cases in which significant organized crime involvement exists; or

C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.331 Commentary: The purpose of this guideline is to underscore the principle that prosecution of state crimes, except in the circumstances set forth above, is primarily the responsibility of the state authorities. These guidelines will be construed in light of a practical understanding of the realities of state law enforcement rather than a theoretical view of the reach of state law.

9-110.340 No Indictment Shall Be Brought Charging A Violation Of 18 U.S.C. § 1962(c) Based Upon A Pattern of Racketeering Activity Growing Out Of A Single Criminal Episode Or Transaction.

9-110.341 Commentary: The purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute.

9-110.350 In Order To Constitute A Violation of 18 U.S.C. § 1962, The Pattern Of Racketeering Activity Or Collection Of Unlawful Debt Must Have Some Relation To The Purpose Of The Enterprise.

9-110.351 Commentary: This guideline covers the type of situation that occurred in United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied 435 U.S. 957 (1978) in which mere geographic co-location between the enterprise (a trailer park) and the pattern of racketeering activity (gambling) was held insufficient under 18 U.S.C. § 1962(c).

9-110.360 No RICO Count Of An Indictment Shall Charge The Enterprise As A Group Associated In Fact, Unless The Association In Fact Has An Ascertainable Structure Which Exists For The Purpose Of Maintaining Operations Directed Toward An Economic Or Other Identifiable Goal, That Has An Existence That Can Be Defined Apart From The Commission Of The Predicate Acts Constituting The Patterns Of Racketeering Activity.

9-110.361 Commentary: The purpose of this guideline is to restrict the use of the RICO Statute by requiring that the "enterprise" have a demonstrable existence apart from the mere confederation of the individuals committing the underlying predicate acts. However, RICO counts may be approved in otherwise appropriate circumstances when it can be demonstrated that the enterprise has the attributes required by this guideline.

For example, such an enterprise could be an existing club or unincorporated association, with an organizational framework and hierarchy, with individuals occupying offices or positions of authority in the hierarchy over a regular membership; who function in diversified roles. The enterprise must have some common denominator such as an interest, avocation, or other regular activity separate and apart from the criminal acts, but which is directed toward an economic or other identifiable goal. Other indicia of the enterprise's separate existence may include formalized membership, recruitment and induction and/or membership insignia.

Stated another way, independent of the proof of the requisite pattern of racketeering, the evidence must be forthcoming to demonstrate the structure and existence of the enterprise. See United States v. Turkette, 452 U.S. 576 (1981); United States v. Errico, 635 F.2d 152 (2d Cir. 1980).

9-110.400 RICO PROSECUTIVE (PROS) MEMO FORMAT

9-110.401 PREFACE

A well written, carefully organized pros memo is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. This Section sets out the criteria by which a RICO pros memo is evaluated by the Organized Crime and Racketeering

Section. Close attention by attorneys to the comments below will ensure that delays and declinations are kept to a minimum.

9-110.402 PURPOSE

The purpose of standardizing the format for RICO prosecutive memoranda is threefold:

(1) to ensure compliance with the policy of the RICO guidelines;

(2) to ensure legally sufficient indictments and theories of prosecution; and,

(3) to provide a manageable means of conveying sufficient information for the timely review of RICO indictments.

9-110.403 GENERAL REQUIREMENTS

A RICO pros memo shall be an accurate, candid and thorough analysis of the strengths and weaknesses of the proposed prosecution. In the interests of uniformity a RICO pros memo should be divided into the following categories:

1. Identification of the Defendant
2. A Statement of Proposed Charges
3. A Summary of the Case
4. A Statement of the Law
5. A Statement of the Facts
6. Anticipated Defenses/Special Problems or Considerations
7. Forfeiture Section
8. RICO Policy Section
9. Conclusion
10. Final Draft of Proposed Indictment

9-110.404 Specific Requirements

Identification of the Defendants

This section should identify each proposed defendant by name and aliases, date and place of birth (if known), criminal arrests and convictions, current employment and major business or labor interests (if any), and connection to or membership in an organized crime family, corrupt union or other criminal organization. If relevant, the defendant's health, age and potential for flight to avoid prosecution should be noted as factors in determining whether he/she will actually stand trial or receive incarceration. The memo should also indicate whether a defendant's current incarceration is likely to diminish the merit of the proposed charges.

9-110.405 A Statement of Proposed Charges

Since the pros memo will not receive final approval until the proposed indictment is reviewed, it is required that the memo provide a schematic of the proposed charges, such as:

Defendant	Charge	Indictment
Smith	Hobbs Act	Counts 3, 4, 5
	Taft-Hartley	Counts 6-10
	RICO	Counts 1 and 2
Jones	Taft-Hartley	Counts 6-10
	Tax Evasion	Count 11
	RICO	Counts 1 and 2

9-110.406 Summary of the Case

This section summarizes the significant highlights of the evidence in the case and the prosecutive theory upon which it is based. The summary should marshall the evidence in a manner likely to provide a clear understanding of the nature and strength of the evidence. While the Summary section covers the same ground as the Statement of Facts, the latter section requires greater detail and witness attribution.

Because the Summary is a narrative outline of the Facts section, which in turn is to be based strictly on admissible evidence, neither section should contain informant information, general intelligence data or interesting but inadmissible hearsay. It is not the function of the Summary, once the case reaches the pros memo stage, to establish the significance of the prosecution beyond that suggested by the evidence itself. The strength of the case becomes blurred, not enhanced, by resorting to irrelevant references (from an evidentiary standpoint) to organized crime's involvement or similar allegations. The Summary is essentially equivalent to the Government's summation; the Facts section is comparable to a trial brief; neither should stray into areas which the court at trial would not likely permit.

9-110.407 Statement of the Law

This section should state the legal elements of proof for each of the crimes alleged, to include the relevant case law (particularly from the appropriate Circuit) governing those elements. Even though the reviewer has undoubtedly seen these elements and cases many times before, the Law section serves the important role of establishing that the writer is knowledgeable of his/her burden and has prepared the memo accordingly. Except in unusual cases the Statement of Law should precede the Statement of Facts; this sequence provides the reviewer with the legal standards against which the evidence is to be evaluated.

The Statement of Law section relates only to the elements of proof and relevant case law in that area. Legal problems and solutions which relate to other areas, such as the Federal Rules of Evidence, anticipated attacks against wiretaps, photo spreads, or joinder of offenses, to name but a few, should be discussed in the Anticipated/Defenses/Special Problems section.

The Statement of Law must provide the following information:

(a) The precise formulation of the RICO enterprise.

(b) The relevant case law of the circuit which supports this formulation of the enterprise.

(c) Any case law, regardless of the circuit it originated in, which would preclude this prosecution.

(d) How the enterprises's affairs were conducted through the pattern of racketeering activity.

(e) How the enterprise was engaged in or its activities affected interstate commerce.

(f) If applicable, the elements and theory of any conspiracy to violate 18 U.S.C. § 1962.

9-110.408 Statement of Facts - Proof of the Offense.

As the title suggests, this section should state facts, not opinions, hearsay, informant information or colorful asides. The facts must be recited concisely, accurately, and logically - if for no other reason than that the time within which a pros memo is approved is in inverse proportion to the accuracy and quality of the Facts section. Obviously not every fact unearthed during the investigation should be included and a pros memo which contains needless or peripheral detail has no better chance for prompt approval than one that contains too little. Accordingly, pros memos which merely incorporate by reference investigative reports or grand jury material, or which boilerplate extensive portions of investigative reports within the Statement of Facts Section, are not sufficient.

The recommended format for the Facts section is to set out the relevant gist of each key witness' anticipated testimony, individually and in chronological sequence. Not all cases are best articulated in this manner but there should be good reason to depart from the general format. Although it is usually more convenient to write up the case in a single narrative which combines the testimony of several witnesses, do not do so. For many of the reasons set out below, and based on past experience, such narratives are to be discouraged. The Summary section, if done well, will be sufficient to put each witness' testimony in correct context. Where there are groups of witnesses who will merely authenticate documents or who will testify to essentially the same recurring events, their testimony need not be individually summarized.

Before the substance of a particular witness' testimony is set out, the writer must indicate whether the witness has been immunized or promised any considerations and, if so, the details thereof. The witness' past criminal record should be stated. And, importantly, the writer should note whether the witness has already testified in the grand jury; if not, an explanation should be supplied together with the basis for believing that the testimony will be available at trial.

The prospective testimony should be specific on all major points, providing, where possible, the names, dates and places of key events and conversations to the extent the witness has and can do so. Where, for example, two Government witnesses have attended a conspiratorial meeting with two proposed defendants, the description of each witness' testimony of that meeting should cover the areas of when, where and who said what. Key meetings or conversations must not be summarized to the point where it is unclear to the reader what was said and by whom. A phrase such as "It was then suggested and agreed by the defendants that they would pay the kickback to 'A'" is unacceptable, because, upon close analysis, it is uncertain whether each defendant specifically and verbally "agreed" to something or whether "agreement" was simply inferred by the witness. And the passage also suggests that the defendants agreed specifically to a "kickback," which would be a significant inculpatory admission, when in fact the testimony may only allege that they agreed to make a "payment" which arguably constituted a kickback. Avoid such characterizations and/or generalizations of this type. If the evidence results from a wiretapped or recorded conversation, the key remarks of a defendant should be quoted verbatim. If the evidence was not recorded then the correct procedure is to set forth, as precisely as recalled by the witness, what was said.

For example, "A" will testify that "B" showed a loan application to the group and complained that "C", a union trustee, was balking at processing the loan. "D" responded, 'Let's pay "C" two points as a fee.' "B" said, 'Good idea, I'll tell him.' Although this recitation doesn't explicitly indicate that the "fee" was intended to be a kickback, it is obvious from the context that it was, especially since "C", as a fiduciary of the fund, could not legally receive a fee for processing the loan application. In the Anticipated Defenses section the writer would of course, anticipate the claim that the defendants intended only to pay a legal fee. The writer would then refute the claim both on its factual incredulity and by citing the case law and union constitution (if applicable) which prohibit such a conflict of interest.

A frequent defect in a pros memo, for which the above hypothetical also serves as an example, is for the writer to gloss over, or fail to recognize, inconsistencies or weaknesses in the case. If two or more Government witnesses participated in an event or conversation which is critical to the case, the extent to which the witnesses are consistent or contradictory on any key point is also critical. The pros memo should supply, in the example above, "E"s account of the same meeting with "A", "B" and "D". A general statement, often made in pros memos, that "E" corroborates "A"s testimony that the meeting with "B" and "D" occurred" is unacceptable. The critical questions are: Does "E" attribute the same remarks to "D" as "A" does? Does "E" attribute the same responses to "B"? If not, were "A" and "E" asked to cover the same ground in the grand jury and, if not, why not? It is not unusual for one Government witness to corroborate another Government witness on some points while being in dispute on others. The writer must recognize, and discuss, those points which are critical and indicate the extent of the problem. Not all differences in recollection warrant discussion in the pros memo but material differences do. A pros memo should also alert the reviewer if a Government witness has contradicted himself in past statements on major points.

The Statement of Facts should not contain conjecture or opinion, except as allowed by the Rules of Evidence (e.g., state of mind). Frequently pros memos include assumptions or conclusions drawn by a witness based on extrinsic events. For the most part, objections to testimony along these lines will be sustained as hearsay. The writer must also avoid asserting his/her own subjective opinions as if they are fact. For example, "Immediately after his meeting with "E" and "A", according to airline records and cancelled checks, defendant "D" flew to Chicago and discussed the kickback with "C", the union trustee." In fact, the airline records and checks may only establish that "D" flew to Chicago, from which the inference is drawn that a meeting occurred.

9-110.409 Anticipated Defenses/Special Problems of Considerations

The Defense section should cover the factual and evidentiary weaknesses in the case and the likely legal defenses or theories. It would be impossible here to list all of the recurring defenses encountered in RICO prosecutions. In any event, each case is unique. It is the writer's job to recognize, based upon a thorough review of the grand jury transcripts, investigative reports, court papers, etc., which potential defenses merit discussion. For illustrative purposes, the writer should always consider the following:

a. If a search warrant was involved, is there a probable cause issue? Was there proper inventory served? Has the writer personally reviewed the warrant and affidavit and been satisfied that the search will pass muster at a suppression hearing? If the search is questionable, how will the loss of its fruits affect the case; how difficult is the taint problem?

b. If a wiretap was involved, was there proper minimization; prompt service of inventory; adequate voice identification;

accurate transcriptions made; are key conversations audible; were the original tapes properly sealed and stored; were § 2517(5) orders obtained for use of recorded conversations in unrelated prosecutions; etc., etc.?

c. If a defendant's prior sworn testimony, confession, or inculpatory admissions are relevant, what will be his defense: failure to warn; failure to comply with Departmental regulations; earlier promise of immunity or non-prosecution?

d. Does the case involve an unusual application of a Federal statute, such as the applicability of the Travel Act to a particular state's commercial bribery statute? If so, what is the prevailing case law in the Circuit? How unique is the enterprise that is alleged; what is the prosecutive theory of each defendant's participation in a pattern or racketeering acts; is the theory of participation against one defendant different than as against another?

e. If the indictment contains a RICO conspiracy charge, how does the proof aliunde stack up against each defendant? What is the test and procedural technique in the district of prosecution for proving a conspiracy? How serious will be the spill-over prejudice if the court strikes the evidence against a particular defendant?

f. Are there problems involving:

i: Statute of Limitations and pre-indictment delay;

ii: Prosecutorial vindictiveness;

iii: Tax disclosure;

iv: Pre-indictment publicity; Rule 6(e) violations;

v: Chain of custody and authenticity questions for key prosecution documents;

vi: Alibis; entrapment; Bruton.

In addition to the selected categories above and/or whatever unique problems exist in the case, the writer should make every effort to convey the seriousness of a potential problem instead of skirting it. If a key Government witness, upon whom part or all of the prosecution rests, has been convicted of perjury or fraud or has testified in a series of acquittals, it would not be enough to note that his credibility will be severelytested, which states the obvious. In such a case the pros memo should indicate why the witness' testimony, despite these handicaps, will be credible.

It is not necessary, obviously, to address every conceivable defense nor is it required that the writer negate a defense that would be inapplicable simply to show that an effort was made to anticipate defenses. On the other hand it ought to be a rare case where a defendant raises a substantial issue at trial which was not discussed in the pros memo but the existence of which was or should have been anticipated.

Special problems should also be anticipated. Examples include recordings of poor audibility, the exercise of a privilege (marital or constitutional), the need to depose gravely ill witnesses, and the availability of protected witnesses in multi-district prosecutions.

9-110.410 Forfeiture

The purpose of this section is to set forth the proof by defendant when the indictment charges that interests of that defendant are subject to forfeiture pursuant to 18 U.S.C. § 1963. This section must deal with the following issues:

a. The identity of the interest(s) sought.

b. The proof that those interests are exclusively owned by the defendant.

c. The theory upon which forfeiture is predicated (*i.e.* - interest acquired/maintained or interest affording a source of influence over the enterprise);

d. The identity of any third parties who have a claim to the property sought to be forfeited (*e.g.*, victims of extortion, lien holders, bona fide purchasers for value) or third parties whose property rights will be substantially affected by a forfeiture of the defendant's interest (*e.g.*, minority stockholders in a closely held corporation, partners, individuals with an undivided interest in the property).

e. How the submitting attorney plans to preserve the interests of the United States *and* innocent third parties in the property during the interval between the entry of the judgment of forfeiture and the time when the Government may seize and dispose of the property.

f. What the ultimate disposition of the property should be (*e.g.*, is it commercially feasible to sell it, should it be returned to third parties, should it be destroyed, etc.).

g. Is the forfeiture sought disproportionate to the criminal conduct charged?

As the foregoing questions illustrate, there are many troublesome issues surrounding RICO forfeitures which will surface after the property has been forfeited. It is the submitting attorney's responsibility to anticipate these problems and develop a forfeiture plan before the indictment is returned.

9-110.411 RICO Policy Section

In this section of the pros memo the submitting attorney must explain how the facts in this case relate to the RICO Guidelines. The submitting attorney must do more than restate the Guidelines in a conclusory fashion; he/she must explain "why" RICO is appropriate. In addition, the RICO Guidelines must be read as a whole. In other words, to be approved, a proposed RICO must not only evidence those principles which justify RICO's use, but also must not be contrary to those principles which weigh against its use. For example, where a proposed RICO prosecution would be prohibited under one guideline, prosecution will not necessarily be authorized simply because it does fit within one of the other guidelines.

9-110.412 Conclusion

This section is self-explanatory. It can also be used to indicate miscellaneous items such as anticipated length of trial, the date by which the indictment must be returned, and other matters.

9-110.413 Proposed Indictment - Final Draft

A pros memo will not receive final action unless the final draft of the proposed indictment is simultaneously submitted for review. It goes without saying that indictments must be proofread carefully. While the Section's review will pick up the more obvious errors in pleading, other errors involving allegations of fact, time, or place will only be caught by the trial attorney's personal familiarity with the evidence. All statutory citations, particularly of state statutes, should be double-checked for typographic errors. Review by the Organized Crime and Racketeering Section of all proposed RICO cases is not a substitute for the necessary first line review at the field level before the case is submitted to the Criminal Division.

One of the principal reasons RICO reviews take longer than anticipated is that the case either has not been reviewed at the originating office by a supervisor, or the draft indictment is incomplete and/or unaccompanied by a pros memo. Another recurring problem is the submission by the submitting attorney of a "final" draft indictment to Strike Force 18, which the author continues to modify without informing the reviewer, or simultaneously submits for review within the originating office. In any event, the indictment being reviewed turns out not to be the same indictment ultimately submitted for approval. Therefore, in order to avoid wasted effort the submitting attorney must not forward as a final draft indictment one which he/she has not in fact finalized or which has not been approved by the originating office.

Further, it is the responsibility of the submitting attorney after the indictment has been returned to forward a copy bearing the seal of the Clerk of Court, to the Organized Crime and Racketeering Section.

9.110.500 Forms

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UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-110.000 ORGANIZED CRIME AND RACKETEERING

9-110.100 RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 91-617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass any illegitimate enterprise affecting interstate or foreign commerce.

9-110.101 Division Approval

No RICO criminal or civil prosecutions or civil investigative demand shall be issued without the prior approval of the Organized Crime and Racketeering Section, Criminal Division. See RICO Guidelines at USAM 9-110.200, infra.

9-110.102 Investigative Jurisdiction

18 U.S.C. §1961(10) provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. §1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. §1961.

9-110.110 Prohibited Activities

The RICO statute creates three new substantive offenses, and one conspiracy offense contained in 18 U.S.C. §1962, subsections (a), (b), (c), and (d).

18 U.S.C. §1962(a), which outlaws the acquisition of an enterprise with income derived from illegal activity, provides in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal derivation of the funds. The acquisition can in all respects be legitimate. Congress simply makes it illegal to invest ill-gotten gains. (See United States v. Cauble, 706 F.2d, Crim. No. 82-2087 (5th Cir. May 31, 1983); United States v. Zang, 703 F.2d 1186 (10th Cir. 1982); United States v. McNary, 620 F.2d 621 (7th Cir. 1980)).

18 U.S.C. §1962(b), which outlaws the acquisition or maintenance of an interest or control in an enterprise through illegal activity, provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an

> unlawful debt to acquire or maintain, directly or indirectly any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal acquisition or maintenance of an interest or control. Examples are the acquisition of control through extortion or a scheme to defraud, see United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), and the maintenance of an interest through bribery. United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982); United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), cert. denied 435 U.S. 952 (1978).

18 U.S.C §1962(c), which outlaws the use of an enterprise to commit illegal acts, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt. (Emphasis supplied)

This section is designed to reach those persons who by employment or association in an enterprise use that enterprise to engage in unlawful activities. The enterprise may be legitimate, but need not be. See USAM 9-110.100. For example, a group of individuals could organize an enterprise without legal form or title, but with the appearance of legitimacy, to perpetrate a scheme to defraud certain banking institutions and the U.S. Small Business Administration, as alleged in United States v. Rafsky, Cr. No. 75-0247R (E.D. Va.). United States v. Martino, 648 F.2d 367 (3d Cir), 648 F.2d 407 (1981), vacated in part 650 F.2d 952 (1982).

18 U.S.C. §1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

See United States v. Sutherland, 656 F.2d 1181, reh'g denied 663 F.2d 101 (5th Cir. 1981).

9-110.120 Common Elements

Violations of 18 U.S.C. §1962(a), (b) or (c) require proof of either a pattern of racketeering activity or the collection of an unlawful debt. In a pervasive scheme of criminal activity it is not uncommon to find both elements. Where both are present, each can be charged in a separate count.

In addition, violations of 18 U.S.C. §1962(a), (b) or (c) require that the enterprise involved be engaged in or affect interstate or foreign commerce. This element, the basis for federal jurisdiction, must be proved in all RICO statute cases. It is not, however, an element of proof that the particular acts with which a defendant is charged have, in and of themselves, any effect on interstate or foreign commerce. See United States v. Groff, 643 F.2d 396 (6th Cir. 1981); United States v. Bone, 598 F.2d 564, cert. denied 445 U.S. 946 (10th Cir. 1979); United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied sub nom. Walgren v. United States, 102 S. Ct. 2040 (1982); United States v. Allen, 565 F.2d 964 (4th Cir. 1981).

9-110.121 Pattern of Racketeering Activity

To establish a "pattern of racketeering activity," as defined in 18 U.S.C. §1961(5), requires proof of at least two acts of "racketeering activity." Each racketeering activity must itself be an act subject to criminal sanction, that is, violative of an independent statute. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). 18 U.S.C. §1961(1) enumerates, either generically (state) or specifically (federal), acts which qualify as racketeering activity:

A. Violations of State Law - any act or threat involving:

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Narcotic or Other Dangerous Drugs

B. Violations of 18 U.S.C:

1. Section 201 (Bribery)
2. Section 224 (Sports Bribery)
3. Sections 471, 472, 473 (Counterfeiting)
4. Section 659 (Theft From Interstate Shipment) (Felony)
5. Section 664 (Embezzlement from Pension and Welfare Fund)
6. Sections 891, 892, 894 (Extortionate Credit Transactions)
7. Section 1084 (Transmission of Gambling Information)
8. Section 1341 (Mail Fraud)
9. Section 1343 (Wire Fraud)
10. Section 1503 (Obstruction of Justice)
11. Section 1510 (Obstruction of Criminal Investigation)
12. Section 1511 (Obstruction of State or Local Law Enforcement)
13. Section 1951 (Interference with Commerce, Bribery, or Extortion)
14. Section 1952 (Interstate Transportation In Aid of Racketeering)
15. Section 1953 (Interstate Transportation of Wagering Paraphernalia)
16. Section 1954 (Unlawful Welfare Fund Payments)
17. Section 1955 (Prohibition of Illegal Gambling Business)
18. Section 2314 (Interstate Transportation of Stolen Property)
19. Section 2315 (Sale of Stolen Goods)
20. Sections 2421, 2422, 2423, 2424 (White Slave Traffic)

C. Violations of 29 U.S.C.:

1. Section 186 (Restrictions of Payments and Loans to Labor Organizations)
2. Section 501(c) (Embezzlement from Union Funds)

D. Bankruptcy Fraud

E. Fraud in the Sale of Securities

F. Felonious Activity Involving Narcotic or Dangerous Drugs, such as:

1. Manufacture
2. Importation
3. Receiving
4. Concealment
5. Buying
6. Selling
7. Dealing

Any combination of the above-listed crimes can form a pattern of racketeering activity, even if both acts constitute state crimes only. See, however, RICO guidelines on judicial prosecution of cases involving only state predicate crimes. The basis for federal jurisdiction, as mentioned above, is the effect of the enterprise on interstate or foreign commerce. However, nexus or relationship between the acts of racketeering charged must be proved to establish the pattern.

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity"

> was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. REP. No. 91-617, 91st Cong. 1st Sess. 158. See United States v. Martino, 648 F.2d 367 (11th Cir. 1981); United States v. Aleman, 609 F.2d 298, cert. denied 445 U.S. 946 (7th Cir. 1979); United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Moreover, one of the acts must have occurred after the effective date of the RICO statute (Oct. 15, 1970) and the more recent act must have occurred "within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering." 18 U.S.C. §1961(5); United States v. Walsh, 700 F.2d 846 (2d Cir. 1983); United States v. Welsh, 656 F.2d 1059 (5th Cir. 1981), cert. denied sub nom Castell v. United States, 102 S.Ct. 1767 (9182). The Criminal Division requires that each defendant must have committed one act of racketeering within the five-year statute of limitation in order to be charged with violating 18 U.S.C. §1962(c). See United States v. Walsh, supra.

Finally, the "social status" of the actor is immaterial. It is not an element of the offense that the defendant is associated with organized crime. He need only have committed acts prohibited by the RICO statute. United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975).

9-110.122 Collection of an Unlawful Debt

The alternative element in a 18 U.S.C. §1962 violation is the collection of an unlawful debt. Unlike the pattern of racketeering element, only one collection is necessary to make out a violation. There are two methods of proving the collection of an unlawful debt. The circumstances are narrow but are peculiarly designed to combat common methods of organized criminal activity.

A. The first method requires:

1. A gambling activity or business illegal under federal, state or local law;

2. A debt incurred or contracted in that gambling activity or business; and

3. Collection of that debt.

B. The second method requires:

1. A debt incurred in connection with the business of lending money which is unenforceable in whole or in part because of federal or state usury laws (to be usurious the rate of interest must be double the legally enforceable rate of interest under state of federal law); and

2. Collection of that debt.

The first method permits a new avenue of attack on the illegal gambling business in that the new forfeiture provisions of 18 U.S.C. §1963, discussed in USAM 9-110.130, permit the forfeiture of the legitimate front used to cover the illegal activity. The second method is designed to attack the loanshark where there is an absence of proof of violence in the collection of the debt.

9-110.130 Criminal Penalties

18 U.S.C. §1963(a) provides for the imposition of a maximum term of

imprisonment of twenty years and a fine of $25,000 for each violation of 18 U.S.C. §1962. In addition, 18 U.S.C. §1963(a) provides for a forfeiture proceeding *in personam* against the defendant in that, upon conviction, the violator:

> *shall forfeit* to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of Section 1962.

Any forfeiture is subject, of course, to the rights of innocent persons. Once the property interests of the accused are forfeited, 18 U.S.C. §1963(c) grants the courts the power to authorize the Attorney General to seize the forfeited property or interest and dispose of the same in accordance with the provisions of the subsection.

At the time of an indictment charging a violation of 18 U.S.C. §1962, the United States may move pursuant to 18 U.S.C. §1963(b) for a restraining order or prohibition or other device, including a request for a performance bond, to protect any property interest subject to forfeiture under 18 U.S.C. §1963(a). Where forfeiture of the enterprise and other property interests used in the commission of a 18 U.S.C. §1962 violation will be sought, the United States can and should move to protect that property interest from liquidation and disposal during the pendency of the criminal proceeding via this provision.

The Federal Rules of Criminal Procedure require the inclusion of an allegation in the indictment specifying the property interests to be forfeited. The purpose of this allegation is to apprise the accused, in accordance with the standards of due process, that he stands to lose his property interests which are utilized in violation of 18 U.S.C. §1962. *See* *United States* v. *Bello*, 470 F. Supp. 723 (S.D. Calif. 1979).

9-110.140 Civil Remedies

9-100.141 Of the United States

The civil remedies contained in the RICO statute are designed "to free the channels of commerce from predatory activities" and not to punish the violator, which remains within the province of the criminal provisions discussed in USAM 9-110.130. S. REP. NO. 91-617, 91st Cong., 1st Sess. 81 (1969); *United States* v. *Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States* v. *Local 560, International Brotherhood of Teamsters*, 560 F. Supp. 511 (D. N.J. 1982).

A. 18 U.S.C. §1964(a) grants district courts the power to hear civil actions by the United States to:

1. Divest a person of any interest in an enterprise;
2. Restrain future activities or investments of any person;
3. Dissolve or reorganize any enterprise, subject to the rights of innocent persons.

B. 18 U.S.C. §1964(b) authorizes the Attorney General, as defined in 18 U.S.C. §1961(10), to institute civil proceedings and directs the courts to expedite such matters. 18 U.S.C. §1964(b) also provides for interlocutory restraining orders and prohibitions and the acceptance of performance bonds pending the final disposition of the civil proceeding.

C. A preceding criminal action is not a prerequisite to the institution of a civil action. However, careful consideration should be given to filing a civil action initially where informants who could be identified by discovery under the Federal Rules of Civil Procedure are concerned. In fact, since the discovery tools provided in a civil action could jeopardize a criminal case prior to trial, the initial finding of a civil case where a criminal proceeding is anticipated, or the simultaneous seeking of an indictment and filing of a Section 1964 civil action is not recommended. Furthermore, in the event that a civil action is filed subsequent to a conviction in a criminal proceeding, Section 1964(d) provides for the assertion of the doctrine of collateral estoppel by the United States in a civil proceeding.

9-110.200 RICO GUIDELINES PREFACE

The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.

Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate it remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed--the infiltration of organized crime into the nation's economy.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative perogratives of the Department of Justice.

9-100.210 Authorization of Prosecution: The Review Process

Effective September 15, 1980, the review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section. To commence the review process, a final draft of the proposed indictment and a prosecutive memorandum shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. The guidelines provide detailed guidance for the use of RICO charges in criminal investigations and prosecutions, as well as in all civil applications of RICO. Attorneys are, however, encouraged to seek guidance from the Organized Crime and Racketeering Section, telephonically or by letter, prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review. Communication with the Organized Crime and Racketeering Section well in advance of indictment may result in the resolution of problems with a proposed RICO indictment and effect an expeditious review.

The submitting attorney must anticipate that the RICO review process, which is handled on a first-in-first-out basis, is a time consuming process, in which the reviewer has no control over the number of cases submitted for review during a given time frame. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. Unless there is a backlog, 15-working days is usually sufficient. The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecutive memorandum at a later date.

9-110.211 Duties of the Submitting Attorney

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, the Section shall be notified in writing of any significant rulings which have an impact upon the RICO statute. For example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the U.S. Attorney as well as the defense should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other U.S. Attorneys' offices handling similar RICO matters.

Once a verdict has been obtained, the U.S. Attorney should forward the following information to the Organized Crime and Racketeering Section for retention: (a) the verdict on each count of the indictment, (b) a copy of the judgment of forfeiture, (c) estimated value of the forfeiture, (d) judgment and sentence(s) received by each RICO defendant.

9-110.300 RICO SPECIFIC GUIDELINES

9-100.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, the attorney for the government should seek authorization for an indictment charging a RICO violation only if in his judgment those charges:

A. Are necessary to ensure that the indictment:

1. Adequately reflects the nature and extent of the criminal conduct involved; and

2. Provides the basis for an appropriate sentence under all the circumstances of the case; or

B. Are necessary for a successful prosecution of the government's case against the defendant or a co-defendant; or

C. Provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

9-110.311 Commentary

All-encompassing examples are difficult, if not impossible, to formulate when discussing RICO; however, by way of illustration only:

A. When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;

B. When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;

C. When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as: prior similar acts, continuing crime or conspiracy), a RICO count my be appropriate;

D. When a substantial prosecutive interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which he has acquired, maintained, operated or conducted in violation of 18 U.S.C. §1962, RICO may be appropriate.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division.

9-110.321 Commentary

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Box 571, Ben Franklin Station, Washington, D.C. 20044, at least 15-working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, as authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. §1962 is not required.

In addition to the above considerations, the use of RICO in a prosecution is also governed by the Principles of Federal Prosecution (July 1980). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the Principles of Federal Prosecution.

9-110.330 Charging RICO Counts

A RICO count of an indictment will not be charged where the predicate acts consist solely and only of state offenses except in the following circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest;

B. Cases in which significant organized crime involvement exists; or

C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.331 Commentary

The purpose of this guideline is to underscore the principle that prosecution of state crimes, except in the circumstances set forth above, is primarily the responsibility of the state authorities. These guidelines will be construed in light of a practical understanding of the realities of state law enforcement rather than a theoretical view of the reach of state law.

9-110.340 Charging a Violation of 18 U.S.C. §1962(c)

No indictment shall be brought charging a violation of 18 U.S.C. §1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.

9-110.341 Commentary

The purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute.

9-110.350 Relation to Purpose of the Enterprise

In order to constitute a violation of 18 U.S.C. §1962, the pattern of racketeering activity or collection of unlawful debt must have some relation to the purpose of the enterprise.

9-110.351 Commentary

This guideline covers the type of situation that occurred in *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied* 435 U.S. 957 (1978) in which mere geographic co-location between the enterprise (a trailer park) and the pattern of racketeering activity (gambling) was held insufficient under 18 U.S.C. §1962(c).

9-110.360 Charging Enterprise as a Group Associated in Fact

No RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic or other identifiable goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

9-110.361 Commentary

The purpose of this guideline is to restrict the use of the RICO statute by requiring that the "enterprise" have a demonstrable existence apart from the mere confederation of the individuals committing the underlying predicate acts. However, RICO counts may be approved in otherwise appropriate circumstances when it can be demonstrated that the enterprise has the attributes required by this guideline.

For example, such an enterprise could be an existing club or unincorporated association, with an organizational framework and hierarchy, with individuals occupying offices or positions of authority in the hierarchy over a regular membership; who function in diversified roles. The enterprise must have some common denominator such as an interest, avocation, or other regular activity separate and apart from the criminal acts, but which is directed toward an economic or other identifiable goal. Other indicia of the enterprise's separate existence may include formalized membership, recruitment and induction and/or membership insignia.

Stated another way, independent of the proof of the requisite pattern of racketeering, the evidence must be forthcoming to demonstrate the structure and existence of the enterprise. See United States v. Turkette, 452 U.S. 576 (1981); United States v. Errico, 635 F.2d 152 (2d Cir. 1980).

9-110.400 RICO PROSECUTIVE (PROS) MEMO FORMAT

9-110.401 Preface

A well written, carefully organized pros memo is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. This section sets out the criteria by which a RICO pros memo is evaluated by the Organized Crime and Racketeering Section. Close attention by attorneys to the comments below will ensure that delays and declinations are kept to a minimum.

9-110.402 Purpose

The purpose of standardizing the format for RICO prosecutive memoranda is threefold:

A. To ensure compliance with the policy of the RICO guidelines;

B. To ensure legally sufficient indictments and theories of prosecution; and,

C. To provide a manageable means of conveying sufficient information for the timely review of RICO indictments.

9-110.403 General Requirements

A RICO pros memo shall be an accurate, candid and thorough analysis of the strengths and weaknesses of the proposed prosecution. In the interests of uniformity, a RICO pros memo should be divided into the following categories:

A. Identification of the Defendant

B. A Statement of Proposed Charges

C. A Summary of the Case

D. A Statement of the Law

E. A Statement of the Facts

F. Anticipated Defenses/Special Problems or Considerations

G. Forfeiture Section

H. RICO Policy Section

I. Conclusion

J. Final Draft of Proposed Indictment

9-110.404 Specific Requirements

Identification of the Defendants

This section should identify each proposed defendant by name and aliases, date and place of birth (if known), criminal arrests and convictions, current employment and major business or labor interests (if any), and connection to or membership in an organized crime family, corrupt union or other criminal organization. If relevant, the defendant's health, age and potential for flight to avoid prosecution should be noted as factors in determining whether he/she will actually stand trial or receive incarceration. The memo should also indicate whether a defendant's current incarceration is likely to diminish the merit of the proposed charges.

9-110.405 A Statement of Proposed Charges

Since the pros memo will not receive final approval until the proposed indictment is reviewed, it is required that the memo provide a schematic of the proposed charges, such as:

Defendant	Charge	Indictment
Smith	Hobbs Act	Counts 3, 4, 5
	Taft-Hartley	Counts 6-10
	RICO	Counts 1 and 2
Jones	Taft-Hartley	Counts 6-10
	Tax Evasion	Count 11
	RICO	Counts 1 and 2

9-110.406 Summary of the Case

This section summarizes the significant highlights of the evidence in the case and the prosecutive theory upon which it is based. The summary should marshall the evidence in a manner likely to provide a clear understanding of the nature and strength of the evidence. While the Summary section covers the same ground as the Statement of Facts, the latter section requires greater detail and witness attribution.

Because the Summary is a narrative outline of the Facts section, which in turn is to be based strictly on admissible evidence, neither section should contain informant information, general intelligence data or interesting but inadmissible hearsay. It is not the function of the Summary, once the case reaches the pros memo stage, to establish the significance of the prosecution beyond that suggested by the evidence itself. The strength of the case becomes blurred, not enhanced, by resorting to irrelevant references (from an evidentiary standpoint) to organized crime's involvement or similar allegations. The Summary is essentially equivalent to the government's summation; the Facts section is comparable to a trial brief; neither should stray into areas which the court at trial would not likely permit.

9-110.407 Statement of the Law

This section should state the legal elements of proof for each of the crimes alleged, to include the relevant case law (particularly from the appropriate circuit) governing those elements. Even though the reviewer has undoubtedly seen these elements and cases many times before, the Law section serves the important role of establishing that the writer is knowledgeable of his/her burden and has prepared the memo accordingly. Except in unusual cases the Statement of Law should precede the Statement of Facts; this sequence provides the reviewer with the legal standards against which the evidence is to be evaluated.

The Statement of Law section relates only to the elements of proof and relevant case law in that area. Legal problems and solutions which relate to other areas, such as the Federal Rules of Evidence, anticipated attacks against wiretaps, photo spreads, or joinder of offenses, to name but a few, should be discussed in the Anticipated/Defenses/Special Problems section.

The Statement of Law must provide the following information:

A. The precise formulation of the RICO enterprise.

B. The relevant case law of the circuit which supports this formulation of the enterprise.

C. Any case law, regardless of the circuit it originated in, which would preclude this prosecution.

D. How the enterprises's affairs were conducted through the pattern of racketeering activity.

E. How the enterprise was engaged in or its activities affected interstate commerce.

F. If applicable, the elements and theory of any conspiracy to violate 18 U.S.C. §1962.

9-110.408 Statement of Facts--Proof of the Offense

As the title suggests, this section should state facts, not opinions, hearsay, information or colorful asides. The facts must be recited concisely, accurately, and logically--if for no other reason than that the time within which a pros memo is approved is in inverse proportion to the accuracy and quality of the Facts section. Obviously not every fact unearthed during the investigation should be included and a pros memo which contains needless or peripheral detail has no better chance for prompt approval than one that contains too little. Accordingly, pros memos which merely incorporate by reference investigative reports or grand jury material, or which boilerplate extensive portions of investigative reports within the Statement of Facts section, are not sufficient.

The recommended format for the Facts section is to set out the relevant gist of each key witness' anticipated testimony, individually and in chronological sequence. Not all cases are best articulated in this manner but there should be good reason to depart from the general format. Although it is usually more convenient to write up the case in a single narrative which combines the testimony of several witnesses, do not do so. For many of the reasons set out below, and based on past experience, such narratives are to be discouraged. The Summary section, if done well, will be sufficient to put each witness' testimony in correct context. Where there are groups of witnesses who will merely authenticate documents or who will testify to essentially the same recurring events, their testimony need not be individually summarized.

Before the substance of a particular witness' testimony is set out, the writer must indicate whether the witness has been immunized or promised any considerations and, if so, the details thereof. The witness' past criminal record should be stated. And, importantly, the writer should note whether the witness has already testified in the grand jury; if not, an explanation should be supplied together with the basis for believing that the testimony will be available at trial.

The prospective testimony should be specific on all major points, providing, where possible, the names, dates and places of key events and conversations to the extent the witness has and can do so. For example, where two government witnesses have attended a conspiratorial meeting with two-proposed defendants, the description of each witness' testimony of that meeting should cover the areas of when, where and who said what. Key meetings or conversations must not be summarized to the point where it is unclear to the reader what was said and by whom. A phrase such as "It was then suggested and agreed by the defendants that they would pay the kickback to 'A'" is unacceptable; because, upon close analysis, it is uncertain whether each defendant specifically and verbally "agreed" to something or whether "agreement" was simply inferred by the witness. And the passage also suggests that the defendants agreed specifically to a "kickback," which would be a significant inculpatory admission, when in fact the testimony may only allege that they agreed to a make a "payment" which arguably constituted a kickback. Avoid such characterizations and/or generalizations of this type. If the evidence results from a wiretapped or recorded conversation, the key remarks of a defendant should be quoted verbatim. If the evidence was not recorded, the correct procedure is to set forth, as precisely as recalled by the witness, what was said. For example, "A" will testify that "B" showed a loan application to the group and complained that "C," a union trustee, was balking at processing the loan. "D" responded, "Let's pay 'C,' two points as a fee." "B" said "Good idea, I'll tell him." Although this recitation doesn't explicitly indicate that the "fee" was intended to be a kickback, it is obvious from the context that it was, especially since "C," as a fiduciary of the fund, could not legally receive a fee for processing the loan application. In the Anticipated Defenses section the writer would, of course, anticipate the claim that the defendants intended only to pay a legal fee. The writer would then refute the claim both on its factual incredulity and by citing the case law and union constitution (if applicable) which prohibit such a conflict of interest.

A frequent defect in a pros memo, for which the above hypothetical also serves as an example, is for the writer to gloss over, or fail to recognize, inconsistencies or weaknesses in the case. If two or more government witnesses participated in an event or conversation which is critical to the case, the extent to which the witnesses are consistent or contradictory on any key point is also critical. The pros memo should supply, in the example above, "E's" account of the same meeting with "A," "B" and "D." A general statement, often made in pros memos, that "E" corroborates "A's" testimony that the meeting with "B" and "D" occured is unacceptable. The critical questions are: Does "E" attribute the same responses to "B?" If not, were "A" and "E" asked to cover the same ground in the grand jury and, if not, why not? It is not usual for one government witness to corroborate another government witness on some points while being in dispute on others. The writer must recognize and discuss those points which are critical and indicate the extent of the problem. Not all differences in recollection warrant discussion in the pros memo but material differences do. A pros memo should also alert the reviewer if a government witness has contradicted himself in past statements on major points.

The Statement of Facts should not contain conjecture or opinion, except as allowed by the Rules of Evidence (e.g., state of mind). Frequently pros memos include assumptions or conclusions drawn by a witness based on extrinsic events. For the most part, objections to testimony along these lines will be sustained as hearsay. The writer must also avoid asserting his/her own subjective opinions as if they are fact. For example, "Immediately after his meeting with "E" and "A," according to airline records and cancelled checks, defendant "D" flew to Chicago and discussed the kickback with "C," the union trustee." In fact, the airline records and checks may only establish that "D" flew to Chicago, from which the inference is drawn that a meeting occurred.

9-110.409 Anticipated Defenses/Special Problems of Considerations

The Defense section should cover the factual and evidentiary weaknesses in the case and the likely legal defenses or theories. It would be impossible here to list all of the recurring defenses encountered in RICO prosecutions. In any event, each case is unique. It is the writer's job to recognize, based upon a thorough review of the grand jury transcripts, investigative reports, court papers, etc., which potential defenses merit discussion. For illustrative purposes, the writer should always consider the following:

A. If a search warrant was involved, is there a probable cause issue? Was there proper inventory served? Has the writer personally reviewed the warrant and affidavit and been satisfied that the search will pass muster at a suppression hearing? If the search is questionable, how will the loss of its fruits affect the case; how difficult is the taint problem?

B. If a wiretap was involved, was there proper minimization; prompt service of inventory; adequate voice identification; accurate transcriptions made; are key conversations audible; were the original tapes properly sealed and stored; were 18 U.S.C. §2517(5) orders obtained for use of recorded conversations in unrelated prosecutions, etc.?

C. If a defendant's prior sworn testimony, confession, or inculpatory admissions are relevant, what will be his defense: failure to warn; failure to comply with Departmental regulations; earlier promise of immunity or non-prosecution?

D. Does the case involve an unusual application of a federal statute, such as the applicability of the Travel Act to a particular state's commercial bribery statute? If so, what is the prevailing case law in the circuit? How unique is the enterprise that is alleged; what is the prosecutive theory of each defendant's participation in a pattern or racketeering acts; is the theory of participation against one defendant different than as against another?

E. If the indictment contains a RICO conspiracy charge, how does the proof aliunde stack up against each defendant? What is the test and procedural technique in the district of prosecution for proving a conspiracy? How serious will be the spill-over prejudice if the court strikes the evidence against a particular defendant?

F. Are there problems involving:

1. Statute of limitations and pre-indictment delay;

2. Prosecutorial vindictiveness;

3. Tax disclosures;

4. Pre-indictment publicity; Fed. R. Crim. P. 6(e) violations;

5. Chain of custody and authenticity questions for key prosecution documents;

6. Alibis; entrapment; Bruton.

In addition to the selected category above and/or whatever unique problems exist in the case, the writer should make every effort to convey the seriousness of a potential problem instead of skirting it. If a key government witness, upon whom part or all of the prosecution rests, has been convicted of perjury or fraud or has testified in a series of acquittals, it would not be enough to note that his credibility will be severely tested, which states the obvious. In such a case, the pros memo should indicate why the witness' testimony, despite these handicaps, will be credible.

Obviously, it is not necessary to address every conceivable defense nor is it required that the writer negate a defense that would be inapplicable simply to show that an effort was made to anticipate defenses. On the other hand, it ought to be a rare case where a defendant raises a substantial issue at trial which was not discussed in the pros memo but the existence of which was or should have been anticipated.

Special problems should also be anticipated. Examples include recordings of poor audibility, the exercise of a privilege (marital or constitutional), the need to depose gravely ill witnesses, and the availability of protected witnesses in multidistrict prosecutions.

9-110.410 Forfeiture

The purpose of this section is to set forth the proof by defendant when the indictment charges that interests of that defendant are subject to forfeiture pursuant to 18 U.S.C. §1963. This section must deal with the following issues:

A. The identity of the interest(s) sought.

B. The proof that those interests are exclusively owned by the defendant.

C. The theory upon which forfeiture is predicated (i.e., interest acquired/maintained or interest affording a source of influence over the enterprise);

D. The identity of any third parties who have a claim to the property sought to be forfeited (e.g., victims of extortion, lien holders, bona fide purchasers for value) or third parties whose property rights will be substantially affected by a forfeiture of the defendant's interest (e.g., minority stockholders in a closely held corporation, partners, individuals with an undivided interest in the property).

E. How the submitting attorney plans to preserve the interests of the United States and innocent third parties in the property during the interval between the entry of the judgment of forfeiture and the time when the government may seize and dispose of the property.

F. What the ultimate disposition of the property should be (e.g., is it commercially feasible to sell it, should it be returned to third parties, should it be destroyed, etc.).

G. Is the forfeiture sought disproportionate to the criminal conduct charged?

As the foregoing questions illustrate, there are many troublesome issues surrounding RICO forfeitures which will surface after the property has been forfeited. It is the submitting attorney's responsibility to anticipate these problems and develop a forfeiture plan before the indictment is returned.

9-110.411 RICO Policy Section

In this section of the pros memo the submitting attorney must explain how the facts in this case relate to the RICO Guidelines. The submitting attorney must do more than restate the guidelines in a conclusory fashion; he/she must explain "why" RICO is appropriate. In addition, the RICO Guidelines must be read as a whole. In other words, to be approved, a proposed RICO must not only evidence those principles which justify RICO's use, but also must not be contrary to those principles which weigh against its use. For example, where a proposed RICO prosecution would be prohibited under one guideline, prosecution will not necessarily be authorized simply because it does fit within one of the other guidelines.

9-110.412 Conclusion

This section is self-explanatory. It can also be used to indicate miscellaneous items such as anticipated length of trial, the date by which the indictment must be returned, and other matters.

9-110.413 Proposed Indictment--Final Draft

A pros memo will not receive final action unless the final draft of the proposed indictment is simultaneously submitted for review. It goes without saying that indictments must be proofread carefully. While the section's review will pick up the more obvious errors in pleading, other errors involving allegations of fact, time, or place will only be caught by the trial attorney's personal familiarity with the evidence. All statutory citations, particularly of state statutes, should be double-checked for typographic errors. Review by the Organized Crime and Racketeering Section of all proposed RICO cases is not a substitute for the necessary first line review at the field level before the case is submitted to the Criminal Division.

One of the principal reasons RICO reviews take longer than anticipated is that the case either has not been reviewed at the originating office by a supervisor, or the draft indictment is incomplete and/or unaccompanied by a pros memo. Another recurring problem is the submission by the submitting attorney of a "final" draft indictment to Strike Force 18, which the author continues to modify without informing the reviewer, or simultaneously submits for review within the orginating office. In any event, the indictment being reviewed turns out not to be the same indictment ultimately submitted for approval. Therefore in order to avoid wasted effort, the submitting attorney must not forward as a final draft indictment one which he/she has not in fact finalized or which has not been approved by the originating office.

Further, it is the responsibility of the submitting attorney after the indictment has been returned to forward a copy bearing the seal of the clerk of court, to the Organized Crime and Racketeering Section.

9.110.500 FORMS

9-110.600 SYNDICATED GAMBLING

Sections 801-811 of the Organized Crime Control Act of 1970, which amend Title 18, United States Code, by adding Sections 1511 and 1955, are designed to combat "illegal gambling business" or syndicated gambling. 18 U.S.C. §1511 is directed at the political and police corruption which makes widespread illegal gambling possible, while 18 U.S.C. §1955 is directed at the illegal gambling itself.

9-110.601 Basis for Federal Jurisdiction

Congress enacted this legislation pursuant to its power to regulate interstate commerce. In so doing, Congress made the finding that illegal gambling does involve widespread use of and does have an effect upon interstate commerce. Hence, the federal government has jurisdiction to initiate investigations and prosecutions of persons conducting large scale illegal gambling businesses without showing that the proscribed activity has affected interstate commerce. *Perez* v. *United States*, 402 U.S. 146 (1971); *United States* v. *Harris*, 460 F.2d 1041, 1048 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972); *Schneider* v. *United States*, 459 F.2d 540 (8th Cir.), *rehearing denied*, 478 F.2d 1403, *cert. denied*, 409 U.S. 877 (1972).

9-110.602 Scope of Federal Jurisdiction

Congress did not intend to occupy the field of illegal gambling exclusively nor to relieve local law enforcement bodies of their obligations to enforce local gambling provisions. The syndicated gambling laws are directed only at those individuals who operate gambling businesses of major proportions: selection of targets for investigation and prosecution should be made on that basis. *See United States* v. *Riehl*, 460 F.2d 454, 458 (3d Cir. 1972).

9-110.603 Investigative or Supervisory Jurisdiction

Investigative jurisdiction for violations of the syndicated gambling provisions is vested in the Federal Bureau of Investigation. In investigating, the FBI is authorized under 18 U.S.C. §2516 to intercept wire or oral communications pursuant to court order. *See* USAM 9-7.000 (Electronic Surveillance). The services of the FBI laboratory are available both to analyze any physical evidence seized and to support expert testimony at the time of trial.

Supervision of prosecutions under these statutes, including investigations and service of warrants, is vested in the Organized Crime and Racketeering Section.

9-110.604 Definitions

Both 18 U.S.C. §1511 and §1955 utilize the same definition of "illegal gambling business." The breadth of activities included under the meaning of the term "gambling" are identical, as are the activities excluded from coverage. *See* USAM 9-110.200.

9-110.610 Obstruction of State or Local Law Enforcement

A violation under 18 U.S.C. §1511 may be shown by proving:

A. That two or more persons conspired to obstruct the enforcement of the criminal laws of a state or local government.

B. That such conspiracy was intended to facilitate an illegal gambling business.

C. That one such person was an official or employee of the state or local government (e.g., a policeman, member of the city council, mayor; the statute is intended to be broad and should be so interpreted in this area).

The **Chairman**. Our next witness is the Honorable Charles L. Marinaccio, Commissioner, Securities and Exchange Commission.

Now, if it is agreeable with you, can we put your entire statement in the record and let you take about 5 minutes and give us the thrust of it?

STATEMENT OF HON. CHARLES L. MARINACCIO, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, DC

Mr. **Marinaccio**. Mr. Chairman, I would be pleased to do that.

Mr. Chairman, my name is Charles Marinaccio. I am a member of the Securities and Exchange Commission.

I am here today to state that the committee should enact legislation to end what I think is excessive use of the RICO statute in the area of private civil suits and treble damages. I believe there is an urgent need to amend RICO by legislation to end the excessive uses to which the statute's private civil remedy has been put.

This view is consistent with the views of the Task Group on Regulation of Financial Services, which was chaired by Vice President Bush, and included SEC Chairman Shad as a member. In its report issued last year, the Bush task group urged that RICO be amended to eliminate nuisance litigation and to ensure that RICO's private civil liability provisions are not misused by private parties in litigation involving financial institutions.

It seems to me that RICO was intended in part to protect law-abiding businesses and businessmen from injuries caused by organized crime. Senator Hruska has gone into that. I want to associate myself with Senator Hruska's remarks.

In my reading of the legislative history of the treble damage provision, it appears to me that it was intended by the author of that provision to provide a remedy for those who have been hurt by organized crime. It appears to me that subsequent events show that the remedy has not been used solely or even primarily to neutralize the effects of organized crime. For example, it has become a standard practice to add a RICO charge to lawsuits under the securities laws.

Many private plaintiffs alleging securities fraud have been able to make out a RICO claim based on essentially the same evidence that supports a securities fraud claim. We think that the civil remedy in RICO has the potential to substantially alter 50 years of history under the Securities and Exchange Commission's laws which has a finely balanced regulatory scheme for regulating the securities industry.

For example, under RICO, it enables plaintiff to claim treble damages even in cases where Congress has expressly limited recovery on securities law to actual damages. We know from experience in the last Congress that where Congress wants to enact a civil treble damage provision in the securities laws, it knows how to do so. Last year, it enacted the Insider Trading Sanctions Act, and Congress took a good amount of time and a lot of deep analysis in order to do that.

The SEC has the ability to provide civil injunctions in court. We can bar individuals and businesses from the business on engaging in the securities business. We cooperate with the Justice Department in bringing criminal cases to enforce the securities laws. We administer an important self-regulatory system for regulating the securities law with the New York Stock Exchange, the American Institute of Certified Public Accountants, the American Stock Exchange, and the over-the-counter market which we think is a very effective methodology for regulating the securities markets. And we also cooperate and rely to some extent on the private rights of action under the securities laws to help us regulate the securities industry.

Now, I believe that this whole panoply of powers which we have under the securities laws has given us the best capital markets that the free world has. Indeed, anywhere in the world, because other nations do not have free capital markets. And we think that perhaps the abuse of cases brought under civil RICO may have the possibility to alter that regulatory structure in ways that we feel would not be helpful to the public interest.

There have been many suggestions of specific ways of altering the RICO statute. I have looked into them and they all have their advantages and disadvantages. I personally like the idea, the approach in the *Sedima* case, where you provide a criminal predicate before you can bring a civil RICO action. What the RICO statute does is take a whole panoply of Federal, State criminal actions and it sort of metamorphoses them and allows a civil action to be built on them without the required burden of proof that you ordinarily get in a criminal case. So it seems to me it would be a benefit to, before allowing a civil case to be brought, to have a predicate of a criminal conviction.

I do believe that a criminal indictment would suffice as a predicate because that would go in the direction very strongly of making clear that you actually have an organized crime case before you build a treble damage provision on it.

Mr. Chairman, I have tried to move through this as rapidly as I could, in the light of your request for an oral summary of my remarks.

The Chairman. Thank you. You have done a good job and we appreciate it. And we want to commend you for your testimony here today.

Now, I have some questions but I do not want to rush you. I would like to give you time to answer the questions.

Would you answer these for the record?

Mr. **Marinaccio**. I would be delighted to, Mr. Chairman. Thank you very much.

[Prepared statement on responses to questions follow:]

STATEMENT OF CHARLES L. MARINACCIO,
MEMBER OF THE SECURITIES AND EXCHANGE COMMISSION,
BEFORE THE COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

The Private Civil Liability Provisions of the Racketeer Influenced and Corrupt Organizations Act

May 20, 1985

Chairman Thurmond and Members of the Committee:

I appreciate this opportunity to present my views on the private civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). I believe there is an urgent need to amend RICO by legislation to end the excessive uses to which the statute's private civil remedy has been put. This view is consistent with the views of the Task Group on Regulation of Financial Services, which was chaired by Vice President Bush and included SEC Chairman Shad as a member. In its report issued last year, the Bush Task Group urged that RICO be amended to eliminate nuisance litigation and to ensure that RICO's private civil liability provisions are not misused by private parties in litigation involving financial institutions.

I make these remarks from the perspective of a Member of the Securities and Exchange Commission, and as a person who has been involved in law enforcement and legislation in the financial services area for most of the past 23 years, most recently for nine years as a staff member of the U.S. Senate Committee on Banking, Housing, and Urban Affairs. My first job out of law school, after a brief clerkship, was as a trial attorney for the Organized Crime and Racketeering Section of the Justice Department's Criminal Division. I remember well that, at that time, there was serious concern that criminal enterprises were investing millions of dollars in proceeds of illicit activities in legitimate businesses. The fear was that these criminal elements would use these businesses to disguise their illegal activities, corrupt the businesses, and undermine our market economy. As I recall, these concerns eventually gave rise to the enactment of RICO in 1970.

RICO was intended, in part, to protect law-abiding businessmen and businesswomen from injuries caused by organized crime. To this end, RICO provides a civil, treble damages remedy to any person injured in his or her business or property by a violation of the substantive provisions of RICO. The broadest of these substantive provisions makes it unlawful for any person employed by or associated with any enterprise to conduct, or participate in the conduct of, the enterprise's affairs through a pattern of racketeering activity. "Racketeering activity" is defined to include "any offense involving * * * fraud in the sale of securities." A "pattern of racketeering activity" is defined as two acts of "racketeering activity" occurring within ten years of one another.

The sponsor of the amendment adding the civil remedy provision to the RICO bill described the amendment's purpose as to enable "those who have been wronged by organized crime [to] be given access to a legal remedy." Subsequent events have shown, however, that the remedy has not been used solely, or even primarily, to neutralize the effects of organized crime. RICO charges have been made in a wide variety of securities cases against legitimate businesses having nothing whatsoever to do with organized crime. It has become standard practice to add a RICO charge to lawsuits challenging tender offers. Ordinary disputes with securities brokers now commonly involve charges of racketeering.

Under RICO's civil liability provision, many private plaintiffs alleging securities fraud have been able to make out a RICO claim based on essentially the same evidence as supports the securities fraud claim. In other words, RICO's civil liability provision has turned virtually every securities fraud claim into a potential RICO claim, with all the benefits that RICO confers on plaintiffs, including potential treble damages and attorneys' fees and access to federal courts even for state law claims. Although, to my knowledge, no private RICO action predicated on securities fraud has yet gone to judgment, RICO claims coupled with securities fraud claims seem to have become the rule rather than the exception.

The RICO civil remedy may substantially alter the balance of private and public rights and remedies under the securities laws that Congress and the courts have carefully crafted over the last 50 years. For instance, it enables plaintiffs to claim treble damages even in cases where Congress has expressly limited recovery under the securities laws to actual damages. Moreover, it enables plaintiffs to make out treble damage claims under RICO even where the courts have held that there is no private right of recovery under the securities laws. By permitting private plaintiffs to bypass the established regulatory scheme, it threatens to disrupt the balance of the scheme.

The existing regulatory scheme provides for enforcement of the federal securities laws in four ways: civil and administrative remedies through the Commission, criminal enforcement through the Justice Department, enforcement efforts of industry self-regulatory oganizations, and private actions.

The Commission's primary civil remedy is a federal court injunction, which directs the subject to comply with the law in the future and is enforceable through contempt of court proceedings. The Commission may also initiate administrative proceedings against regulated entities, principally broker-dealers, investment companies, investment advisers, and their professional employees, as well as transfer agents. Administrative proceedings may be instituted upon conviction of any number of criminal offenses, including extortion, mail and wire fraud, fraud involving financial institutions, larceny, bribery, burglary, theft, robbery, forgery, counterfeiting, embezzlement, and misappropriation of funds or securities. Administrative proceedings may result in censure, imposition of limitations on activities, or suspension or revocation of a person's right to engage in the securities business.

Issuers of securities are subject to administrative proceedings for failure to comply with the disclosure requirements and certain other provisions of the Securities Exchange Act of 1934. Individuals causing such failures may be named as respondents also.

Sanctions in criminal actions for violations of the securities laws, which must be filed through the Department of Justice, include substantial fines and imprisonment for up to five years for each violation.

The Commission cooperates closely with the enforcement efforts of industry self-regulatory organizations. These groups are organized under the federal securities laws. They include all stock exchanges in the country and the National Association of Securities Dealers, Inc. They are responsible for policing stockbrokers and securities marketplaces. They have the obligation and authority under the securities laws to fine, suspend, expel, or otherwise discipline member broker-dealers, and persons associated with these members, who have violated the securities laws. Another securities industry self-regulatory organization is the Municipal Securities Rulemaking Board. The Board formulates rules relating to brokers, dealers, and banks conducting business in securities issued by state and local governments.

The Commission relies on private rights of action under the federal securities laws to supplement its enforcement efforts under this carefully crafted regulatory and enforcement structure. The Commission participates in selected private litigation involving significant securities law issues, especially when the litigation involves precedential matters. Unlike the RICO statute, these private rights of action do not provide for treble damages or attorneys' fees. They nevertheless have served well as supplements to other enforcement mechanisms provided for under the securities laws.

Besides threatening to disrupt the balance of this regulatory scheme, private civil RICO has turned ordinary commercial disputes involving legitimate businesses into burdensome legal actions containing charges of "racketeering." According to the recent report of the Civil RICO Task Force of the American Bar Association's Section of Corporation, Banking, and Business Law, only 9 percent of the civil RICO cases have involved allegations of criminal activity of a type generally associated with organized crime, such as arson, bribery, extortion, gambling, theft, and political corruption. Forty percent, on the other hand, involve allegations of securities fraud, and another 37 percent allege common law fraud in a commercial or business setting. Highly respected banks and securities, law, and accounting firms have all had to pay high legal costs and bear the other burdens of litigation to defend themselves against the "racketeering" charges. In many cases, the allegations involve nothing more than a misunderstanding with a broker or a challenge to an interest rate level charged by a bank. Indeed, the threat of negative publicity attendant to "racketeering" charges, as well as the exposure to treble damages, provides plaintiffs with powerful settlement tools, regardless of the merits of the underlying legal claims.

I do not believe that the Congress that enacted RICO was alerted to or intended the results that the statute's private civil remedy provision has wrought. Whether the civil remedy provision has developed as a bonanza for the excessively litigious or is merely a statute in need of fine tuning, I hope a consensus can be achieved for action by Congress to alter the present state of affairs.

There have been several suggestions of ways in which the private civil liability provisions could be altered to remedy recognized problems in the securities fraud area. The Justice Department is developing suggestions for legislative action consistent with the recommendation of the Bush Task Group discussed above. In addition, the recently issued report of the Civil RICO Task Force of the American Bar Association contains recommendations for legislation to amend RICO.

Among the proposals to amend RICO to mitigate problems in the securities fraud area are proposals to delete "fraud in the sale of securities" as a predicate offense; require evidence showing two or more independent securities violations to establish a "pattern of racketeering activity"; prohibit private claims based on vicarious liability; and require prior criminal convictions to establish a civil RICO claim.

Each of these approaches has advantages and disadvantages. I believe, however, that the last approach mentioned, predicating the availability of a private remedy on prior criminal convictions, offers the most reasonable way to mitigate problems in the securities fraud area. It involves amending RICO to restrict its private right of action based on securities claims to cases in which the plaintiff shows that the defendant previously has been criminally convicted of two predicate acts. This change would bring certainty to the scope of the treble damage private right of action.

The approach also avoids denying securities fraud plaintiffs a RICO remedy when they have been the victims of organized criminal activity. It would operate to conform private litigation under RICO to cases involving the type of egregious conduct that Congress intended to reach. In this context, my concerns about remaining inconsistencies between private rights of action under RICO and other private remedies under the securities laws would be greatly alleviated.

The approach I recommend is similar to the result reached by the United States Court of Appeals for the Second Circuit in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), cert. granted, 105 S. Ct. 901 (1985), which was argued before the Supreme Court on April 17, 1985. The circuit court in Sedima, after an exhaustive review of RICO's legislative history, concluded that the statute required proof of prior criminal convictions for the predicate acts of racketeering to establish a private treble damages cause of action.

I urge Congress to act soon to resolve the problems with private civil RICO that have been identified. Although the Supreme Court is currently considering some of these issues in the Sedima case, important public policy issues are at stake that are within the jurisdiction of Congress. I commend the Chairman and this Committee for taking the lead in addressing this pressing problem.

I have attached as exhibits to this statement copies of:

(1) a statement I submitted to the American Bar Association Civil RICO Task Force;

(2) a letter on civil RICO sent by Chairman John S.R. Shad of the SEC to Attorney General William French Smith in December 1983; and

(3) a speech on civil RICO that I delivered to the Committee on Corporate Finance of the

MEMORANDUM FOR THE AMERICAN BAR ASSOCIATION
CIVIL RICO TASK FORCL

Statement of Views of Charles L. Marinaccio, Commissioner,
Securities and Exchange Commission

Introduction

I appreciate the invitation of the Task Force on Civil RICO to present my views on the civil treble damages provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq*.

Claims under RICO have become a frequent addition to complaints in private civil actions alleging securities fraud. This development has engendered tremendous controversy over the competing policies implicated by RICO's private right of action. As many commentators have noted, the threat of the negative publicity attendant to "racketeering" charges alone can provide the plaintiff with a powerful settlement tool regardless of the merits of the underlying legal claim.

Of particular concern is the fact that the potential availability of a statutory treble damage action under RICO threatens to expand significantly the carefully crafted scheme of private rights of action, and express and implied remedies for securities law violations that the Congress and the courts have fashioned over the past 50 years. I do not believe that, in adopting RICO, the Congress intended to effect such a fundamental change in the operation of the federal securities laws, which should be made, if at all, only after complete and thorough examination of all relevant considerations.

Effect of RICO on Liability Under the Federal Securities Laws

Most treble damage RICO actions predicated on securities fraud have alleged violations of 18 U.S.C. § 1962(c), which makes it unlawful for

> any person employed by or associated
> with any enterprise engaged in, or the
> activities of which affect, interstate

> or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Because of the breadth of this prohibition, of RICO's private right of action, and of the statutory definitions provided such terms as "enterprise," most plaintiffs have had little difficulty in fashioning securities law claims into a colorable RICO claim. Although to my knowledge, no private RICO action predicated on securities fraud has yet gone to judgment, I believe that the availability of this expansive cause of action may enable private plaintiffs to alter significantly the balance of rights and remedies established by the securities laws.

First, RICO appears to permit private plaintiffs to recover treble damages in cases where the Congress has expressly limited recovery under the securities laws to actual damages. For example, private recovery under the broad antifraud provisions of Section 10(b), and Rule 10b-5 promulgated thereunder, is limited by Section 28(a) of the Securities Exchange Act of 1934 to actual damages. 15 U.S.C. § 78bb(a). The apparent failure of the Congress to consider this inconsistency during its consideration of RICO stands in direct contrast to the careful and detailed consideration which the Congress afforded to the Insider Trading Sanctions Act of 1984, which authorizes the Commission to seek a civil penalty up to three times an insider trading defendant's profit or loss. In addressing this limited expansion of the remedies available under the Securities Exchange Act, the Congress carefully weighed the potential consequences; the impact of private RICO recovery on the federal securities laws private damage provisions received no such scrutiny.

Second, the breadth of RICO's provisions may even enable certain private plaintiffs to make out claims under RICO where they would not have standing to sue, or there is no implied right of action, under the federal securities laws. Stated differently, RICO may permit private recovery for securities law violations which the Congress and the courts have determined should not give rise to private liability under the securities laws. This result is made even more anomalous by the fact that the RICO plaintiff may obtain treble recovery.

For example, in Blue Chips Stamps v. Manor Drug Stores. 412 U.S. 723 (1975), the Supreme Court held that only actual purchasers and sellers have standing to sue for violations of Rule 10b-5. However, it appears that a person who is fraudulently induced not to buy securities in a public offering might successfully argue that he was injured by the conduct of the affairs of an appropriately characterized "enterprise" through two or more acts of securities fraud, and thus make out a claim under RICO.

Similarly, in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the Supreme Court held that an unsuccessful tender offeror in a contest for control of a corporation does not have an implied cause of action to sue for damages under Section 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e). Nevertheless, it appears that, if some injury is alleged, such as an unfavorable change in the market price of the target corporation's stock, bidders could rely on the same conduct to make out a cause of action for treble damages under RICO.

Finally, it appears that private plaintiffs who can allege similar injury may be able to recover under RICO for violations of the securities laws which the defendant committed against third parties -- notwithstanding the fact that such plaintiffs could not recover at all under the federal securities laws. For example, in Moss v. Morgan Stanley, 719 F.2d 5 (2d Cir. 1983), cert. denied, 104 S.Ct. 1280 (1984), the Second Circuit held that a defendant who purchased stock while in possession of misappropriated information was not liable in damages to the plaintiff (who unwittingly sold stock of the target company prior to public announcement of a tender offer) because the defendant owed no duty of disclosure to that plaintiff. In affirming dismissal of the securities law and RICO claims, however, the court appeared to assume that the plaintiff might have made out a sufficient claim under RICO if the complaint had alleged that the defendant's conduct, in breaching a duty to third parties, did otherwise constitute a violation of the securities laws.

Recommendation for Congressional Action

There is no evidence in the legislative history of RICO that the Congress anticipated that the adoption of that statute would bring about such a significant alteration of the balance of the rights and remedies under the federal securities laws. In a recent decision, the United States Court of Appeals for the Second Circuit expressed similar concerns. See Sedima, S.P.R.L. v. Imrex Co., [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,599 (2d Cir. July 25, 1984). After an exhaustive review of the statute's legislative history, the court concluded that the Congress intended to require proof of a prior criminal conviction for the predicate acts of racketeering in order to establish a private cause of action under RICO. Id.; accord Berg v. First American Bankshares, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,826 (D.D.C. Oct. 19, 1984).

I believe that this construction represents an appropriate resolution of the conflicts that private RICO actions predicated on securities fraud could otherwise create. */ The requirement of a prior criminal conviction introduces elements of prosecutorial discretion and a higher standard of proof that would operate to conform private litigation under RICO to cases involving the type of egregious conduct the Congress intended to reach. In this context, my concerns about any

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*/ An alternative resolution might be the requirement of a criminal indictment as a precondition to the private right of action.

remaining inconsistencies between private rights of action under RICO and the federal securities laws would be greatly alleviated.

Since the courts have been divided in their interpretation of the treble damage cause of action and there is no assurance that the United States Supreme Court will resolve the matter in the near future, I believe it would be desirable for the Congress to codify the Second Circuit's conclusion in an amendment to RICO.

[redacted]

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

CHAIRMAN'S OFFICE
MAILED
DEC 21 1983
Signed by:________

The Honorable William French Smith
Attorney General of the United States
Department of Justice
Constitution Avenue and Ninth Street, N.W
Washington, D.C. 20530

Dear Mr. Attorney General:

Treble damage claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") have become a frequent addition to complaints in private civil actions alleging securities fraud. It appears that, in enacting RICO, the Congress gave little or no consideration to the potential impact of private civil RICO claims on the operation of the private liability scheme of the securities laws.

While the federal courts have not yet fully resolved the issue, the potential availability of a statutory treble damage action under RICO threatens to expand significantly the carefully crafted scheme of express and implied remedies for securities law violations which the Congress and the courts have fashioned over the past 50 years. RICO also expressly provides private rights of action to plaintiffs who may not have such rights under the securities laws. The addition of a RICO claim also can affect settlement negotiations because of the defendant's potential liability for treble damages and attorney's fees as well as the desire to avoid negative publicity in defending "racketeering" charges.

I am writing to propose that our respective staffs meet to discuss possible amendments to RICO's private right of action that might address concerns raised by civil RICO claims while insuring that the efficacy of RICO in criminal actions not be compromised. The attached memorandum, which was prepared by the Commission's Office of the General Counsel, analyzes the interplay between the federal securities laws and RICO and proposes some solutions for private actions.

As you may know, the American Bar Association has set up a task force to study the effects of RICO. I attach for your consideration a statement of issues prepared by the task force. Although the Commission has not endorsed this statement, the issues that it raises warrant careful consideration.

I would appreciate it if you would please have the appropriate member of your staff contact Daniel L. Goelzer, the Commission's General Counsel, (272-3171), to arrange a meeting to discuss these matters.

Sincerely,

John S.R. Shad

Attachments

cc: Richard C. Breeden

MEMORANDUM

December 6, 1983

TO: Chairman Shad

FROM: Office of the General Counsel DGoelzer

RE: Possible Amendments to RICO

This memorandum analyzes the impact of private civil RICO claims on the operation of the private liability scheme of the federal securities laws. Possible solutions to the problems arising in this area are also briefly discussed.

Relationship Between Civil RICO and Private Liability Under the Federal Securities Laws

RICO provides a treble damage remedy to any person injured in his or her business or property by reason of a violation of the substantive prohibitions of RICO. 18 U.S.C. § 1964(c). The broadest of these prohibitions makes it unlawful for any person employed by or associated with any enterprise to conduct, or participate in the conduct of, the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c). "Racketeering activity" is defined to include "fraud in the sale of securities." 18 U.S.C. § 1961(1). A "pattern of racketeering activity" is defined as two acts of "racketeering activity" occuring within ten years of one another, 18 U.S.C. § 1961(5), and has been construed by some courts to include two acts arising out of a single course of conduct. *See, e.g.*, *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1004 (C.D. Cal. 1982).

Although no private RICO action predicated on securities fraud has yet gone to judgment, based on existing case law, it would appear that, in most situations, private plaintiffs alleging fraud under the federal securities laws could also make out a claim under RICO's broad statutory language based on the same evidence. *See, e.g.*, *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* [Current] Fed. Sec. L. Rep. (CCH)

¶ 99,510 (W.D. Mich. Sept. 13, 1983) (churning); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231 (S.D.N.Y. 1983) (churning); Engl v. Berg, 511 F. Supp. 1146 (E.D. Penn. 1981) (fraud in connection with sale of limited partnership interests). See also Spencer Companies, Inc. v. Agency Rent-A-Car, Inc., [1981-82] Fed. Sec. L. Rep. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981) (RICO claim predicated on misleading Schedule 13Ds). The breadth of RICO's civil right of action may enable private plaintiffs to alter significantly the balance of rights and remedies established by the securities laws.

First, RICO appears to permit private plaintiffs to recover treble damages in cases where the Congress has expressly limited recovery under the securities laws to actual damages. For example, private recovery under the broad antifraud provisions of Section 10(b), and Rule 10b-5 promulgated thereunder, is limited by Section 28(a) of the Securities Exchange Act of 1934 to actual damages. 15 U.S.C. § 78bb(a). The apparent failure of the Congress to consider this inconsistency during its consideration of RICO stands in direct contrast to the careful and detailed consideration which the Congress is currently affording to the Commission's pending legislative proposal to authorize the Commission to seek a civil penalty up to three times an inside trading defendant's profit gained or loss avoided. See, e.g., House Report No. 98-355 (Sept. 15, 1983), to accompany H.R. 559, 98th Cong., 1st Sess. (1983). In addressing this limited expansion of the remedies available under the Securities Exchange Act, the Congress has carefully weighed the potential consequences; the impact of private RICO recovery on the federal securities laws private damage provisions received no such scrutiny.

Second, the breadth of RICO's provisions may even enable certain private plaintiffs to make out claims under RICO where they would not have standing to sue, or there is no implied right of action, under the federal securities laws. Stated differently, RICO may permit private recovery for securities law violations which the Congress and the courts have determined should not give rise to private liability under the securities laws. This result is made even more anomalous by the fact that the RICO plaintiff may obtain treble recovery.

For example, in Blue Chips Stamps v. Manor Drug Stores, 412 U.S. 723 (1975), the Supreme Court held that only actual purchasers and sellers have standing to sue for violations of Rule 10b-5; however, it appears that a person who is fraudulently induced not to buy securities in a public offering might successfully argue that he was injured by the conduct of the affairs of an appropriately characterized "enterprise" through two or more acts of securities fraud, and thus make out a claim under RICO.

Similarly, in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the Supreme Court held that an unsuccessful tender offeror in a contest for control of a corporation does not have an implied cause of action to sue for damages under Section 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e). Nevertheless, it appears that, if some injury is alleged, such as an unfavorable change in the market price of the target corporation's stock, bidders could rely on the same conduct to make out a cause of action for treble damages under RICO.

Finally, it appears that private plaintiffs who can allege similar injury may be able to recover under RICO for violations of the securities laws which the defendant committed against third parties — notwithstanding the fact that such plaintiffs could not recover at all under the federal securities laws. For example, in Moss v. Morgan Stanley, [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,478 (2d Cir. Sept. 9, 1983), the Second Circuit held that a defendant who purchased stock while in possession of misappropriated information was not liable in damages to the plaintiff, who unwittingly sold stock of the target company prior to public announcement of a tender offer, because the defendant owed no duty of disclosure to that plaintiff. In affirming dismissal of the securities law and RICO claims, however, the court suggested that the plaintiff might have made out a sufficient claim under RICO if the complaint had alleged defendant's prior criminal conviction based on the same conduct as proof of the requisite racketeering activities. */ See id. at n.15. Such results as those provided in these examples could seriously disrupt the intended operation of the federal securities laws.

Possible Solutions

We have considered how the impact of civil RICO on the private remedies available under the federal securities laws could be mitigated. Set forth below are several potential solutions for your consideration:

1. Delete "Fraud in the Sale of Securities" as a Predicate Offense -- The statute could be amended to preclude reliance on securities fraud violations as proof of "racketeering activity" for purposes of private damage actions. This change would limit the impact of RICO's broad damage remedy on the existing balance of private rights and remedies under the securities laws, although, since mail and wire fraud would remain as RICO predicate offenses, many securities frauds would still be subject to civil RICO. The legislative history of RICO provides little justification for having singled out participants in the securities markets -- already subject to carefully tailored private recovery -- as targets of private RICO claims when the statute does not include violations of laws regulating other segments of the financial services industry as predicate offenses.

2. Redefine "Pattern of Racketeering Activity" in Private Actions -- The statute could be amended to require private plaintiffs relying on securities fraud violations as predicate offenses to meet a higher standard of proof to establish a pattern of racketeering activity, e.g., evidence showing two (or possibly more) securities violations arising from independent fraudulent transactions. This change might reduce the extent to which RICO

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*/ We do not agree with the Second Circuit's holding that the plaintiff may not recover his damages under the federal securities laws. I am advised that the plaintiff may seek Supreme Court review of this decision.

is coextensive with routine, private securities claims, and limit the availability of the RICO remedy to a greater extent to cases within the original contemplation of that statute.

3. Preclude Claims Based on Vicarious Liability -- The statute could be amended to preclude private plaintiff allegations against defendants whose relationship to predicate acts of securities fraud is solely one of vicarious liability. This change would preclude the use of various theories of secondary liability under the securities laws in combination with RICO's broad definition of "enterprise" to permit recovery of treble damages from a variety of potential defendants -- such as brokerage firms, corporations, and law and accounting firms -- not directly responsible for the underlying violations of their employees. This approach would be consistent with the Commission's recommendations to limit imposition of the civil penalty in H.R. 559 to direct violators.

4. Require Separate Racketeering Injury -- The statute could be amended to require private plaintiffs alleging securities fraud violations as acts of racketeering activity to prove some "racketeering injury" that is distinct from the injury resulting from the securities fraud violations. One possibility would be to require that private plaintiffs allege other substantive acts of "racketeering activity" in addition to securities fraud violations in order to make out a claim.

5. Predicate Private Relief on Prior Adjudication -- The statute could be amended to restrict RICO's private right-of action based on securities claims to cases in which the plaintiff could show that the defendant previously had been (i) convicted, or (ii) adjudged liable in a civil action brought by the Department of Justice under RICO. This change would be consistent with the view that the Congress gave little consideration to the private damage remedy, but rather, drafted RICO's prohibitions so broadly in reliance on the Department of Justice's exercise of prosecutorial discretion in filing RICO actions.

* * *

We believe that discussions with the Department of Justice to obtain their reactions to these potential solutions would be useful.

[redacted]

NEWS
SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
(202) 272-2650

Remarks to the
National Association of Manufacturers'
Committee on Corporate Finance
Williamsburg, Virginia

September 17, 1984

RICO and Tender Offers: Public Policy Considerations

Charles L. Marinaccio
Commissioner

The views expressed herein are those of Commissioner Marinaccio and do not necessarily represent those of the Commission, other Commissioners, or the staff.

Good morning. I appreciate very much this opportunity to address the National Association of Manufacturers.

Today I wish to talk about two significant policy issues affecting the jurisdiction of the Securities and Exchange Commission. I believe that these policy issues have a potentially substantial impact on the conduct of business by U. S. corporations. I refer to the urgent need to amend by legislation the Racketeer Influenced Corrupt Organizations Act (RICO) and Congressional consideration of tender offer legislation. Each of these issues has special applicability to the work of the SEC.

RICO

I recall very well the public discussion during the 1950s and 1960s concerning the potential impact of organized crime on legitimate business. My first job out of law school was as a trial lawyer in the organized crime and racketeering section of the Criminal Division of the Justice Department at a time when Robert Kennedy was the Attorney General. My recollection of that time was that at the core there was a fear that large criminal enterprises were earning billions of dollars from illicit activities and that these billions were being invested in legitimate businesses. When syndicate criminals invested such huge sums, business enterprises were corrupted and the competitive climate of the market economy was undermined either by the very fact of the investments or by methods of operations of criminals. As I recall, these concerns eventually gave rise to the passage of RICO in 1970.

Although the legislative history of RICO makes clear that the statute was intended to provide a treble damage remedy for a racketeering injury by a racketeering enterprise, similar to the award of treble damages for a competitive injury actionable under the antitrust laws, unfortunately, the statute was drafted so broadly that the very legitimate corporations and businesses that were intended to be protected under the RICO statute have now become "racketeer" defendants under the statute. Clearly, this is an instance of a valid public policy thrust gone awry in the execution.

I believe that this is an important issue of corporate governance. We in the Federal public policy formulation level expect much of corporations. In return I believe that we have a duty to structure a system of laws which impact on corporate behavior that may fairly be regarded as rational. I further beleive that RICO fails this test.

RICO makes it unlawful for any person to:

(1) use any income derived from a pattern of racketeering activity to acquire an interest in any enterprise;

(2) employ a pattern of racketeering activity to acquire an interest in any enterprise; and

(3) conduct the affairs of any enterprise through a pattern of racketeering activity.

A "pattern of racketeering activity" is defined as two acts of racketeering activity occuring within ten years of one another. The phrase racketeering activity is defined as any one of over 20 acts indictable under Federal and State law including mail fraud, wire fraud and securities fraud.

Given the litigious predilection of our society it is not surprising that imaginative counsel have exercised their duty and attempted to pursue remedies under RICO against legitimate enterprises having nothing whatsoever to do with criminal behavior, let alone a connection with organized crime.

During the past two and one-half years there has been a virtual explosion of civil RICO litigation. Estimates are that the number of published court opinions dealing with civil RICO increased from thirteen by early 1981 to over one-hundred recently even excluding the many cases that are settled. The reason for this increase in litigation is, of course, the availability of a treble damage provision in RICO not available under the Acts that prohibit the individual acts of racketeering under RICO. The availability of a statutory treble damage action under RICO raises a substantial concern in my mind that carefully crafted structures of express and implied remedies for violations of Federal and State law will be undermined. For example, RICO permits private plaintiffs to recover treble damages in instances where the federal securities laws expressly limit recovery to actual damages. Also, RICO may be used by private plaintiffs to make out claims for securities law violations where they would have no basis for a claim under the federal securities laws.

RICO cases have been filed by export-importers against other corporations alleging claims arising out of fraudulent purchase orders, by jewelers against others alleging fraudulent accounting activities and a whole host of similar alleged claims in the nature of common law fraud or contract breaches.

In my view the implicit unfairness of RICO is that it metamorphosises a laundry list of laws which require indictment by a grand jury and proof beyond a reasonable doubt into civil violations actionable under RICO by lumping them together under the rubrick "pattern of racketeering" activity. Civil actions as we know need only carry the burden of proof of a preponderance of the evidence.

It is one thing for the United States government to bring a criminal charge of mail fraud where the defendant has the bulwark of the grand jury interposed between itself and the government and where a trial by jury is subject to a high standard of proof and quite another to piggyback a Federal civil case on the bare allegation of fraud generally under such a statute with a much lower threshold of proof where the defendant is subjected to treble damages. In my view the state of affairs under RICO stands a long history of statutory and judicially allocated remedies under criminal and civil law on its head.

RICO claims, for example, have been made in a whole variety of securities cases such as tender offer litigation, fraud by securities brokers, and fraud in the sale of securities where no racketeer is even remotely involved.

The existence of a new set of remedies for securities violations is troubling for a number of reasons. The legislative history of RICO furnishes absolutely no indication that Congress intended to provide a broad private remedy for violations of the securities laws. Absent some explicit evidence it seems inappropriate to attribute to Congress an intention to alter significantly the balance of rights and remedies established by the securities laws. As the Second Circuit Court of Appeals said in a recent case "It is hard to believe that in adopting civil RICO Congress intended to permit proof of 'willful' violations by only a preponderance of the evidence. Otherwise two misstatements in a proxy solicitation could subject any director of any national corporation to 'racketeering' charges and the threat of treble damages and attorneys' fees."

RICO was enacted as part of the Organized Crime Control Act of 1970, an act designed "to seek the eradication of organized crime in the United States . . . by providing new remedies to deal with unlawful activities of those engaged in organized crime." The only statement accompanying the introduction of the private cause of action in RICO was that it would enable "those who have been wronged by organized crime [to] at least be given access to a legal remedy." Moreover, the only types of securities fraud specifically mentioned in the course of RICO's legislative history are the sale of stolen securities and market manipulation resulting from large purchases and sales of securities by organized crime syndicates. Clearly, Congress did not intend RICO to provide an alternate and more attractive remedy for private parties for non-racketeering violations of Federal and State law, especially since those laws referred to in the RICO statute involve decades of statutory and regulatory evolution and commentary and case law development. Certainly Congress, has shown, for example, in recently enacting a cure for securities law insider trading cases, that where it wishes to do so it will provide explicitly a treble damage type remedy.

Allegations of RICO violations against public companies contain a potent smear factor that can compel even a totally innocent defendant to settle a complaint rather than allow itself to be labelled in newspaper headlines as a racketeer.

There is the large possibility that the application of RICO to non-racketeering securities transactions will be abused because of the absence of prosecutorial discretion in civil cases. While the government may exercise prosecutorial discretion to bring RICO claims that are related to organized criminal activity, there is no analogous restraining influence on civil plaintiffs to assure that the statute functions within the bounds intended by Congress.

Given these concerns, and RICO's application in areas far removed from the fight against organized crime, some courts have read various limitations into the Act in order to conform its use to a reasonable interpretation of congressional intent.

Three very recent Second Circuit opinions reflect a very narrow reading of the statute that could greatly reduce the ability of private plaintiffs to bring a RICO action for treble damages. In one case, the court held that a prior criminal conviction is a prerequisite to a civil RICO action. And, in all three cases, the court held that private plaintiffs must allege a "racketeering injury" in order to have standing to sue under RICO. A "racketeering injury" is different in kind from the harm that occurs as a result of the predicate acts themselves. According to the court, it involves the type of systematic harm to competition and markets with consequent injury to investors and competitors that arises from the infiltration of legitimate enterprises by organized crime.

The Second Circuit's restrictive reading of RICO results from a very careful analysis of the congressional purpose in enacting the statute. In the words of that court, we should not "impute to Congress the intention of federalizing a large portion of the common law . . . or of altogether replacing or eliminating much of the need for extensive bodies of federal law specifically directed at extensively considered evils [without] more explicit language from Congress indicative of such intent."

Notwithstanding these judicial attempts to narrow the scope of RICO, private plaintiffs will probably continue to use RICO's civil right of action to alter significantly the balance of rights and remedies established by the securities and other laws.

This is because the Second Circuit's recent cases do not control future rulings by other circuits and indeed are in conflict with other circuit rulings. Thus, RICO claims may continue to be made in situations where Congress has explicitly limited recovery under Federal law to actual damages and in situations where Congress has not provided a right of action.

In my judgment, Congress needs to revisit the RICO statute. It should specifically make clear in the statute that before a civil claim may be filed under RICO the predicate of a criminal charge by the government is a necessity. It should further make clear that a "racketeering" type injury needs to be shown. That is that more than injury arising from the individual violations need be shown. What should be required is an injury which results from a pattern of racketeering to the competitive position of the enterprise alleging the harm. Perhaps the Supreme Court will do the job. But I believe it is the responsibility of the Congress to take RICO off its head and stand it on its feet.

TENDER OFFERS

[To conserve space in the hearing record, the remainder of Commissioner Marinaccio's remarks, which does not concern the Racketeer Influenced and Corrupt Organizations Act, is not included.]

Answers of Charles L. Marinaccio, Commissioner, Securities and Exchange Commission, to Questions on the Private Civil Liability Provisions of the Racketeer Influenced and Corrupt Organizations Act Posed by the Senate Judiciary Committee

Question 1. Commissioner Marinaccio, as I understand your position, you would require either a criminal conviction or indictment for predicate acts of racketeering in order to establish a private cause of action under RICO. Could this unduly hinder the private litigant by delaying possible recovery until governmental action is taken?

If the criminal indictment alternative is adopted as a prerequisite to a private action, what happens if an acquittal occurs? Would the acquittal in the criminal action prevent recovery in the private civil action?

Answer: With respect to the first part of the question, requiring criminal convictions or indictments for predicate acts need not delay recovery of actual damages. The Committee could provide that the common law doctrine of res judicata */ would not prevent a plaintiff from first recovering his actual damages under a recognized private cause of action, such as securities fraud, and later recovering treble damages under RICO. **/ Indeed, this amendment also would be advisable to avoid the running of the statute of limitations on non-RICO claims during the pendency of the criminal proceedings or before criminal proceedings are brought.

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*/ As the Committee is aware, the doctrine of res judicata -- or "claim preclusion," as it is now known -- ordinarily prevents splitting of claims into successive lawsuits by requiring all grounds upon which a single claim is based to

(footnote continued)

In this way, the plaintiff would be made whole as soon as practicable after the injury. The treble damages punitive award may be delayed, but this is not as objectionable as delaying the award of actual damages, because treble damages are intended to punish the defendant.

There is independent justification in this context for waiving the doctrine of res judicata, if it would prevent the later lawsuit. The doctrine is intended to promote judicial economy by avoiding relitigation of claims. In the civil RICO context, judicial economy would not be unduly strained by permitting two separate lawsuits. The second lawsuit should not be protracted, since it would involve proving only the criminal convictions or indictments on two predicate acts and injury to the plaintiff arising out of the racketeering behavior.

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*/ (footnote continued)

be asserted and concluded in one lawsuit, on pain of being barred from separate suit; a "claim" is defined to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." C.A. Wright, The Law of Federal Courts 524 & n.8, 680-82 (4th ed. 1983), quoting Restatement (Second) of Judgments § 24(1)(1982).

**/ The amount of the first damages award, of course, would be substracted from the later treble damages award.

The second part of your question relates to the effect of a criminal acquittal on a civil RICO action if criminal indictment is adopted as a prerequisite to the action. My view is that there ought to be some clear indication of criminal culpability as a precondition to a civil RICO recovery. That indication is supplied by requiring conviction on two predicate acts. As I mentioned in response to Chairman Thurmond's questions during my testimony, I also would support a formulation that required indictment on two predicate acts. Both the conviction and indictment requirements would introduce an element of prosecutorial review into the civil RICO system. They would ensure that a criminal prosecutor thinks enough of the case to, at a minimum, present it to a grand jury. In most instances, a grand jury also will have voted that there is cause to indict.

It would not trouble me to allow civil recovery based on an indictment on which there is a subsequent acquittal. One purpose of the criminal conviction or indictment requirement is to assure that the case is one that a prosecuter or grand jury has concluded entails criminal intent. Once you have achieved that purpose by imposing the indictment requirement, it should make no difference if there is an acquittal on the indictment.

Question 2. Commissioner Marinaccio, would you favor a legislative proposal that prevents the application of the civil RICO provisions in instances where the federal securities laws provide a source of recovery for the private litigant?

Answer: I would not favor such a limitation. I support a treble damages remedy for securities fraud under RICO in cases where organized crime is involved.

Question 3. Commissioner Marinaccio, do you feel that the treble damages provision of civil RICO is too severe a penalty in securities fraud cases, in light of the limited recovery under existing securities laws which specify an actual damages standard?

Answer: I do not feel that a treble damages remedy for securities fraud is too severe where there is an indication of criminal culpability. As I stated in my testimony, there are a number of ways to assure that civil RICO cases involve organized crime, or other indicia of criminal intent. I favor the approach of requiring a criminal conviction on two RICO predicate acts.

Question 4. One of the predicate offenses in RICO is "fraud in the sale of securities." Should this be limited to "criminal fraud in the sale or other disposition of securities," which the Justice Department has listed as one possible alternative?

Answer: Since _all_ willful violations of the federal securities laws can be criminally prosecuted, the intent of the Justice Department's formulation is not fully clear. The primary difference between _fraud_ in the sale of securities and _criminal fraud_ in the sale of securities is that criminal fraud must be proved beyond a reasonable doubt, while civil fraud need only be proved by a preponderance of the evidence. [*/]

[*/] The Department's additional suggestion that fraud in the _sale_ of securities be expanded to include fraud in the _sale or other disposition_ of securities is unobjectionable. Based on past case law, I believe the word sale would be construed to include a sale or other disposition. _See Rubin v. United States_, 449 U.S. 424 (1981).

It appears that the thrust of the Department's alternative is to limit the RICO treble damages remedy, in securities fraud cases, to situations where there are at least two acts of securities fraud that are proven beyond a reasonable doubt. This is similar to my proposal to require criminal conviction on two counts of securities fraud before allowing civil recovery under RICO. The elements of the claim and the standard of proof would be the same under both proposals. The difference is that, by not requiring a prior criminal conviction or indictment, the Justice Department has lost the element of prosecutorial or grand jury review built into my proposal. There would be no review by a prosecutor of the appropriateness of the criminal allegations. Thus, although the Department's alternative would make it more difficult to prove a civil RICO claim, it would not prevent private plaintiffs from making racketeering allegations in the context of ordinary business and commercial disputes. For this reason, I prefer the criminal conviction or indictment approach.

Question 5. Would you favor limiting "pattern of racketeering activity" to preclude private suits based on a single criminal episode or transaction, with only one victim? As you know, suits can be brought in such cases because of multiple mailings.

Answer: As the Committee is aware, a principal objective of the Justice Department's guidelines on filing criminal RICO charges, a copy of which was attached to Assistant Attorney General Trott's written statement to the Committee, is to prevent the application of RICO to a single criminal episode involving only one victim. I agree with this administration of the statute. I think it comports with Congress' intent to limit the application of RICO to organized crime. Moreover, if it is appropriate in the criminal RICO context, it is even more appropriate in the context of private civil RICO. Therefore, I would favor an amendment limiting the scope of the term "pattern of racketeering activity" to exclude single criminal episodes involving only one victim.

Question 6. Would you favor increasing the burden of proof in private civil cases to "clear and convincing evidence," rather than the normal "preponderance of the evidence"?

Answer: I would not favor increasing the burden of proof in private civil RICO actions to "clear and convincing evidence." If the Committee decides to increase the burden of proof to deal with current problems with private civil RICO, it should change the standard to "beyond a reasonable doubt." Nonetheless, such a step would not be my preferred solution. It is essentially the same proposal as the alternative put forth by the Department of Justice and discussed in response to Question 4 above. As I pointed out there, a principal problem with this approach is that it would not prevent the filing of civil RICO suits in ordinary business and commercial disputes or prevent plaintiffs from using the negative publicity attendant to "racketeering" charges, as well as the exposure to treble damages, as a powerful settlement tool, regardless of the merits of the underlying claims.

June 10, 1985

The Chairman. Our next witness is Daniel W. Persinger, Deputy General Counsel, Federal Deposit Insurance Corporation.

STATEMENT OF HON. DANIEL W. PERSINGER, DEPUTY GENERAL COUNSEL, FEDERAL DEPOSIT INSURANCE CORPORATION, WASHINGTON, DC

The **Chairman.** Sir, would you take 5 minutes like he did and give us the thrust and we will put your entire statement in the record.

Is that agreeable with you?

Mr. **Persinger.** Thank you, Mr. Chairman.

I will do this as quickly as I can.

My name is Dan Persinger. I am the FDIC's deputy general counsel for Closed Banks.

I appreciate this opportunity to give my views on the FDIC's use of civil RICO actions under the RICO's statute.

As we all know, RICO was designed to combat organized criminal activity. In enacting RICO, Congress recognized the need for a broadly based law which would counter such activities as it determined threatened the stability of the Nation's economic system, harmed innocent investors and competitors, interfered with free competition, seriously burdened interstate commerce, threatened domestic security, and undermined the general welfare of the Nation and its citizens.

The FDIC takes the position that it can use this provision of the law to recover damages due to losses when a bank fails. We also think we can use this provision to recover losses suffered by the bank itself which the FDIC is entitled to recover as the bank's receiver. There are a number of controversies which have arisen as to the scope of RICO and its applicability to so-called garden variety criminal fraud, cases. I will not bother to go into those because other witnesses can cover those subjects more adequately than I can.

Let me take a minute, though, to present the FDIC's view of RICO, and this rests on the FDIC's role in the failure of federally-insured banks.

The FDIC insures deposits in virtually all commercial banks in the United States. When a bank insured by the FDIC fails and is closed by its chartering authority, the FDIC is appointed as the bank's receiver to liquidate its assets and to pay claims of creditors and shareholders.

Whenever an insured bank fails, the FDIC must draw upon its insurance fund to pay the claims of insured depositors or to facilitate the assumption of the failed bank's deposits and other liabilities by another insured bank.

In either case, the FDIC has a claim against the failed bank's estate for moneys paid out of its insurance fund. As receiver, the FDIC acts in a private capacity not only by standing in the shoes of the failed bank, but by acting on behalf of the bank's creditors and shareholders in seeking to maximize the recovery of its assets for their benefit.

The FDIC is today liquidating assets in excess of $6.5 billion belonging to 281 failed banks, including the approximately 30 which have failed so far this year. The FDIC's policy is to pursue all those responsible for causing a failed bank to suffer loss, whether that loss was the major contributing cause of the bank's failure or not.

Now, ordinarily the persons that the FDIC has pursued in connection with bank failures have been the bank's officers or employees, such as its outside directors and accountants. There are, however, a small but increasing number of failed banks which have suffered losses due to fraudulent schemes perpetrated by outsiders. Sometimes these losses have been sufficient in and of themselves to cause the failure of a bank. Regardless of the extent of the losses, they are almost invariably indicative of efforts on the part of bank management to deal with the bank's financial problems, such as low earnings or excessive loan losses, by making a quick profit in a short time through a series of questionable transactions.

Bank management does not have to be an active participant in such fraudulent schemes or even be aware of their real nature. It is enough that those in charge are so concerned with the precarious condition of the institution that they neglect to take simple precautionary measures and wind up being victimized.

As banking becomes more competitive, banks are coming under increasing pressure to enter unfamiliar areas of business or to engage in more hazardous practices. They thus become targets for those who see them as easy prey to a variety of fraudulent schemes. When those schemes cause serious financial harm, the bank may fail. Even when the harm is not so extensive, the precarious condition of the bank, coupled with losses caused by management's misguided efforts to save it, will often lead to the same result. Once that happens, the FDIC steps in to salvage what it can. It is in this context that the civil RICO cases promise to be extremely valuable.

Now, Mr. Chairman, on April 3rd of this year, the FDIC filed a 66-page, 9-count civil RICO complaint in the U.S. District Court in Kansas City, KS. I will not go into the details except to say that it was a fairly elaborate scheme whereby the defendants conspired together to gain money from a bank through the use of illegal loans. The FDIC charged these defendants with common law fraud, violation of Federal and State securities laws, violation of wire and mail fraud statutes, and violation of the RICO statute.

The FDIC alleged a scheme in which the bank was offered a series of deals whereby it could make a substantial profit on millions of dollars of loans. In the end, the deal was too good to be true. The loans were never repaid and the bank failed.

We believe that the Indian Springs case illustrates the value of civil RICO to the FDIC where it is attempting to deter criminal conduct aimed at banks which are already in a precarious financial condition. It is also useful as a means of compensating the FDIC for losses to its insurance fund incurred in carrying out its statutory responsibility to proctect the insured depositors in a bank failure.

The FDIC would not favor changes in the present law that could significantly curtail its usefulness as a basis for dealing with organized criminal conduct aimed at federally insured banks.

Since the FDIC would only be filing RICO actions in cases of failed banks, the requirement of a separate racketeering injury would seem to have little impact on FDIC related lawsuits. In such cases, the banks have not only sustained a loss from the criminal activity, but the loss has contributed to the bank's failure as well.

Of equal importance is the fact that we do not view the FDIC's prospective use of civil RICO actions as a threat to the conduct of legitimate business activities. The type of organized conduct which would take advantage of a bank's precarious financial condition or its lack of diligent management to steal money from it can hardly be considered "legitimate" in any sense of the word.

We do, however, suggest one minor change to RICO which would permit it to be used more effectively in cases of bank fraud.

On October 12, 1984, Congress amended the Federal criminal statutes to make it a crime "to defraud a federally chartered or insured financial institution." The penalty is a fine of not more than $10,000 or imprisonment of not more than 5 years, or both.

While the Attorney General may bring a civil action to enjoin a violation of the bank fraud statute, just as in the case of mail or wire fraud, there is no provision in RICO denominating bank fraud a "predicate act" as there is in the case of mail or wire fraud.

We believe bank fraud should be so denominated, thus allowing a private right of action for treble damages where such fraud amounts to a pattern of racketeering. Given the concern shown by Congress over the effect of bank fraud on the Nation's federally chartered and the federally insured institutions, an amendment to RICO is a sensible extension of the intent to make bank fraud a Federal crime.

Thank you very much.

The CHAIRMAN. I want to thank you. I think your recommendation will be very helpful to us. We appreciate your being here today.

Your entire statement will go in the record.

Mr. PERSINGER. Thank you.

[Prepared statement and responses to questions follow:]

STATEMENT ON

THE FDIC's USE OF
CIVIL RICO ACTIONS

BY

DANIEL W. PERSINGER
DEPUTY GENERAL COUNSEL
FEDERAL DEPOSIT INSURANCE CORPORATION

Mr. Chairman and members of the Committee, my name is Dan Persinger. I am the FDIC's Deputy General Counsel for Closed Banks. I appreciate this opportunity to give my views on the FDIC's use of civil RICO actions under Title 18 U.S.C. § 1964(c).

THE RICO STATUTE

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982), was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. Law 91-452 (1970). It authorizes a private right of action for "any person injured in his business or property by reason of a violation of Section 1962". 18 U.S.C. § 1964(c). RICO Section 1962 makes it unlawful, with respect to an enterprise affecting interstate or foreign commerce, for a person to (a) invest income derived from a pattern of racketeering activity in acquiring an interest in, or establishing or operating such an enterprise; (b) acquire, through a pattern of racketeering activity, an interest in or control of such an enterprise; (c) conduct or participate in the conduct of the affairs of such an enterprise through a pattern of racketeering activity; or (d) conspire to violate (a), (b) or (c). 18 U.S.C. §§ 1962 (a)-(d).

RICO was designed to combat the efforts of organized criminal activity. In enacting RICO, Congress recognized the need for a broadly-based law which would counter such activities which it determined threatened the stability of the Nation's economic system, harmed innocent investors and competitors, interfered with free competition, seriously burdened interstate commerce, threatened domestic security and undermined the general welfare of the Nation and its citizens. The Organized Crime Control Act expressly provides that RICO is to be "liberally construed" to effectuate its purposes.

Under RICO, a private citizen can sue for and recover treble damages as a result of injury to his business or property. This private right of action is in addition to the authority given the Attorney General to institute criminal RICO actions and to pursue civil actions seeking not only damages but also (1) divestiture of a person's interest in an enterprise, (2) the imposition of restrictions on a person's future activities or investments, particularly in enterprises of the same type as that involved in the action, or (3) dissolution or reorganization of an enterprise, making due provision for the rights of innocent persons. 18 U.S.C. § 1964 (a) and (b).

A number of controversies have arisen as to the scope of RICO and its applicability to so-called "garden variety" criminal fraud cases. Some commentators and courts have argued that an expansive construction of RICO effectively federalizes a variety of acts formerly deemed criminal only under state laws. Others have argued that such a reading would have RICO supplant existing remedial arrangements, such as those afforded private litigants under the Federal securities laws.

The United States Court of Appeals for the Second Circuit recently narrowed the scope of civil RICO by imposing two limitations on its use: First, in Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482 (1984), and the companion case of Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984), the Second Circuit held that the plaintiff in a civil RICO case was required to plead and prove a "racketeering injury" separate and distinct from any injury caused by the predicate criminal acts set forth in the statute.

Second, in Sedima, the Second Circuit also held that the plaintiff must plead and prove that the defendants had been convicted of the alleged predicate criminal offenses. Both of these limitations are now under review by the Supreme Court.

ROLE OF THE FDIC IN FAILED BANKS CASES

The FDIC insures deposits in virtually all commercial banks in the United States. When a bank insured by the FDIC fails and is closed by its chartering authority, the FDIC is appointed as the bank's receiver to liquidate its assets and to pay claims of creditors and shareholders. Whenever an insured bank fails, the FDIC must draw upon its insurance fund to pay the claims of insured depositors or to facilitate the assumption of the failed bank's deposits and other liabilities by another insured bank. In either case, the FDIC has a claim against the failed bank's estate for monies paid out of its insurance fund. As receiver, the FDIC acts in a private capacity not only by standing in the shoes of the failed bank but by acting on behalf of the bank's creditors and shareholders in seeking to maximize the recovery on its assets for their benefit. The FDIC is today liquidating assets in excess of $6.5 billion (not including $3.5 billion in assets associated with the Continental Illinois assistance transaction) belonging to 281 failed banks, including the approximately 30 which have failed so far this year.

The FDIC's policy is to pursue all those responsible for causing a failed bank to suffer loss, whether that loss was the major contributing cause of the bank's failure or not. This policy serves the dual purpose of maximizing the recoveries available to the FDIC as receiver for the benefit of the bank's creditors and shareholders, and insuring that the FDIC will be able to recover as much of its insurance money as possible. In many cases the FDIC will have used its insurance fund to arrange for the full payment of the bank's depositors and general creditors by having their claims assumed by another insured bank. Where this alternative is used, the FDIC winds up as the failed bank's only general creditor. Since the bank's assets are usually insufficient to pay the FDIC's claim in full, any amounts it recovers from other sources will reduce that shortfall and directly benefit the FDIC's insurance fund.

After a bank fails, the FDIC will conduct an investigation and, depending on the results, may file a claim against the bank's directors and officers for negligence or misconduct in overseeing its operations. The FDIC may also file a claim with the bank's blanket bond insurance carrier to recover monies lost by reason of dishonest acts committed by its employees. In some cases the FDIC will proceed against the bank's outside accounting firm for losses attributable to its negligence in auditing the bank.

The persons responsible for allowing a failed bank to suffer losses are usually its officers or employees, or those who stand in a close relationship such as its outside directors and accountants. These are the people to whom FDIC has traditionally looked for compensation. There are, however, a small but increasing number of failed banks which have suffered losses due to fraudulent schemes perpetrated by outsiders. Sometimes these losses have themselves been sufficient to cause the failure of the bank. Regardless of the extent of the losses, however, they are almost invariably indicative of efforts on the part of bank management to deal with the bank's financial problems - such as low earnings or excessive loan losses - by making a quick profit in a short time through a series of questionable transactions. Bank management does not have to be an active participant in such fraudulent schemes, or even be aware of their real nature. It is enough that those in charge are so concerned with the precarious condition of the institution that they neglect to take simple precautionary measures and wind up being victimized.

As banking becomes more competitive, banks are coming under increasing pressure to enter unfamiliar areas of business or to engage in more hazardous practices. They thus become targets for those who see them as easy prey to a variety of fraudulent schemes. When those schemes cause serious financial harm, the bank may fail. Even when the harm is not so extensive, the precarious financial condition of the bank, coupled with the losses caused by management's misguided efforts to save it, will often lead to the same result. Once that happens, the FDIC steps in to salvage what it can. It is in this context that civil RICO cases promise to be extremely valuable.

Over the past few years, the FDIC has encountered tangible evidence of the harm that can result when certain individuals are willing to translate the following maxims of "common wisdom" for their own illegal ends: "The best way to rob a bank is to own it" and "Borrow a thousand dollars and the bank owns you; borrow a million and you own the bank". The experience of the recent past has shown that individuals are willing to engage in organized criminal activity involving banks which goes far beyond what has been viewed by the courts as "garden-variety fraud", "run-of-the-mill business disputes" or "ordinary commercial litigation". Rather, such illegal activity has been well organized and carried out on a sustained basis, resulting in serious harm to the target institution. When such a case arises, the FDIC has a substantial economic and legal interest in utilizing the benefits of the civil RICO statute to (1) deter similar activity, (2) recoup financial loss to the FDIC's insurance fund as well as to the bank's creditors and shareholders, and (3) establish important legal precedents to help proscribe future illegal activity.

The first civil RICO action filed by FDIC to recover treble damages for losses suffered by a failed bank involved an alleged scheme which, in its complexity, went far beyond the mere commission of two predicate criminal offenses and involved much more than "garden-variety" fraud. Ironically enough, the scheme did not involve a new and unfamiliar activity but rather one which has been around (and criticized by the bank regulators) for a long time.

THE INDIAN SPRINGS STATE BANK CASE

On April 3, 1985 the FDIC filed a 66 page, nine count civil RICO complaint in the U.S. District Court in Kansas City, Kansas. That complaint detailed an alleged scheme whereby the defendants conspired to and did acquire and conduct their own enterprise, the affairs of several limited partnerships, and a money brokerage business in such a manner as to fraudulently secure loans from the failed bank in excess of its lending limits, create an artificial market for the bank's certificates of deposit, create a captive market for the properties controlled by the defendants so as to sell such properties at inflated prices, and to otherwise act in such a manner that each defendant could unlawfully enrich himself. The defendants' activities in organizing the limited partnerships, soliciting the failed bank to provide financing for the purchase of partnership interests, use of "straw borrowers", and the solicitation of persons to invest in the various partnerships, are alleged to have constituted common law fraud, violation of federal and state securities laws, violation of wire and mail fraud statutes, and violation of the RICO statute.

In that complaint we alleged the following facts: The defendants set up a series of limited partnership deals for real estate speculation in Kansas, Missouri and Hawaii. Bank loans were then sought to provide financing for the limited partnership interests in the approximate amount of $3 million. Individuals, some of them only "straw borrowers", were solicited to participate. The proceeds from these loans were deposited directly into bank accounts controlled by the defendants, where the money disappeared. Some of the borrowers were given a cash fee to execute blank loan documents later submitted to the bank. Other borrowers overstated assets, understated liabilities and exaggerated their net worth. Even though the bank sought to collect on the loans, it was unable to do so. Normally the bank would not even have been able to consider making such loans because of its relatively small size. The defendants, however, overcame this problem by offering "courtesy deposits" through a moneybroker. The bank was told that institutional investors would be directed to purchase its certificates of deposit if the bank could issue such certificates above the prevailing rate of interest. That interest rate differential was rebated to the bank which did not have to pay the usual fee to the moneybroker for causing the funds to be deposited. The moneybroker was also a beneficiary of the limited partnerships and received other compensation for his participation in the scheme.

In effect, the FDIC alleged a scheme where the bank was offered a series of deals whereby it could make a substantial profit on millions of dollars of loans. In the end, the deal was too good to be true. The loans were never repaid and the bank failed.

The FDIC charged that as a result of the pattern of racketeering and other violations of law, the Indian Springs State Bank suffered a $3 million loss as well as the loss of its banking business because of its resulting insolvency and failure. The FDIC alleged that its insurance fund suffered a loss as a result of the bank's insolvency and sought damages for that loss. In addition, the FDIC as receiver alleged that the bank suffered losses as a result of the specific predicate acts committed.

FUTURE USE OF RICO

We believe that the Indian Springs case illustrates the value of civil RICO to the FDIC where it is attempting to deter criminal conduct aimed at banks which are already in a precarious financial condition. It is also useful as a means of compensating the FDIC for losses to its insurance fund incurred in carrying out its statutory responsibility to protect the insured depositors in a bank failure.

Banks are an essential element in the Nation's economic system. Organized criminal activity which affects banks can have a profound effect on the stability of the banking system and can hurt innocent depositors, creditors and investors. It is exactly this type of activity with which Congress was concerned in 1970. (See Senate Report No. 617, 91st Cong., 1st Sess., 81-82 (1969).) It remains a legitimate concern today. The vast majority of FDIC-insured commercial banks simply do not have the financial resources or the expertise to protect themselves from organized criminal activity and fraud. Ninety-seven percent of these banks have assets of less than $500 million, eighty-four percent have assets of less than $100 million and sixty-six percent have assets of less than $50 million.

The FDIC would not favor changes in the present law that could significantly curtail its usefulness as a basis for dealing with organized criminal conduct aimed at federally-insured banks. Since the FDIC would only be filing RICO actions in cases of failed banks, the requirement of a separate racketeering injury would seem to have little impact on FDIC-related lawsuits. In such cases the banks have not only sustained a loss from the criminal activity but the loss has contributed to the bank's failure as well. Of equal importance is the fact that we do not view the FDIC's prospective use of civil RICO actions as a threat to the conduct of legitimate business activities. The type of organized conduct which would take advantage of a bank's precarious financial condition, or its lack of diligent management, to steal money from it can hardly be considered "legitimate" in any sense of the word.

We do, however, suggest one minor change to RICO which would permit it to be used more effectively in cases of bank fraud. On October 12, 1984, Congress amended the Federal criminal statutes to make it a crime "to defraud a federally chartered or insured financial institution". The penalty is a fine of not more than $10,000 or imprisonment of not more than five years, or both. 18 U.S.C. § 1344. While the Attorney General may bring a civil action to enjoin a violation of the bank fraud statute, just as in the case of mail or wire fraud, there is no provision in RICO denominating bank fraud a "predicate act", as there is in the case of mail or wire fraud. We believe bank fraud should be so denominated, thus allowing a private right of action for treble damages where such fraud amounts to a pattern of racketeering. Given the concern shown by Congress over the effect of bank fraud on the Nation's federally chartered and federally insured institutions, an amendment to RICO is a sensible extension of the intent to make bank fraud a federal crime.

Mr. Chairman and members of the Committee, I thank you for your kind attention and I would be pleased to answer any questions.

FDIC
Federal Deposit Insurance Corporation
Washington, DC 20429
Legal Division

June 21, 1985

Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

We appreciate the opportunity to respond to the written questions which you submitted following my testimony before the Committee on the Judiciary on May 20, 1985. The following answers constitute our response to the issues which you raised.

Question No. 1

The Federal Deposit Insurance Corporation (FDIC) is using the civil RICO statute for the first time in combating bank fraud. Do you feel that this statute substantially enhances the ability of the FDIC in performing its responsibilities, especially in instances of bank failure? Explain the primary advantages of using the civil RICO provisions in addition to existing Federal remedies.

Answer: The RICO statute definitely enhances the FDIC's ability to perform its statutory responsibilities, most particularly with regard to bank failures. In this regard, the FDIC acts both as a receiver of the failed bank and as an insurer of bank deposits. When acting as a receiver, the FDIC has an independent legal responsibility to maximize the recoveries on the failed bank's assets. Among those assets is the right to pursue legal claims against those causing the bank's failure. The civil RICO provisions substantially enhance the possibility of recovery, thus providing the receiver another means of performing its duty. This is particularly significant because one of the three current causes of bank failures is fraud. To the extent civil RICO provides a means of breaking up organized criminal activity which perpetrates fraud on banks causing their failure, the FDIC is able to rely on a significant means of redress and deterrent to such activity. Also, the more recoveries which the FDIC acting as receiver can make, that much less of a loss is incurred by the FDIC's insurance fund. Last, the RICO statute provides the FDIC with access to Federal courts which may otherwise be unavailable when it is acting as receiver of a failed state chartered bank.

The FDIC thus has a dual interest in the civil RICO statute: maximizing recoveries and breaking up and deterring organized criminal activity causing bank failures.

Question No. 2

Some cases in which private civil RICO suits may be brought involve traditionally business suits brought under state law. How can we best preserve the prerogatives of the states in this area?

Answer: While some private civil RICO suits may involve what is sometimes referred to as traditional business suits ordinarily brought under state law, such RICO suits also presumably involve a significant Federal interest, i.e., preventing organized criminal activity from infiltrating, controlling and damaging the economy. It is that organised criminal activity element which distinguishes a RICO suit from the ordinary business suit brought under state law. The doctrine of pendent jurisdiction often allows state law claims to be litigated in a federal forum just as diversity jurisdiction accomplishes the same result. The prerogatives of the states have not been circumscribed in those areas, and it is submitted that the RICO statute will similiarly not limit the prerogatives of states in this area.

Many states have enacted their own RICO statutes, thus providing similar benefits and remedies on a state level. The structure of a RICO statute allows the states more flexibility to define "racketeering activity" or "predicate offenses" to fit local concerns and needs in areas untouched by the Federal RICO statute.

Question No. 3

Is there a need for change in the "predicate offenses" which trigger RICO violations, including more specificity in connection with offenses that are described in general terms?

The FDIC would urge the inclusion of bank fraud as a predicate RICO offense. Bank fraud is one of the three single largest causes of bank failures today. When such fraud is conducted in a manner as to amount to organized criminal activity, the consequences can be very serious. Making bank fraud a predicate offense would substantially enhance the FDIC's ability to utilize the benefits of the RICO statute.

Question No. 4

Should a RICO criminal conviction be required before a private suit could be brought?

Answer: The FDIC would oppose any requirement that a criminal conviction be required before a private RICO suit could be initiated. Even though the civil RICO provisions are part of a larger criminal statutory scheme, the purposes of civil RICO are totally distinct from the criminal RICO provisions.

Criminal statutes are geared for punishing offenders through the use of a specific kind of deterrence utilizing incarceration and/or fines based on the grand jury, indictment and conviction. The government has a deterrence option beyond incarceration and/or fines in only two notable areas: RICO and the Continuing Criminal Enterprises Act. Yet these options are still only available upon conviction.

The criminal prosecutional system grants an inherent and necessary amount of discretion to help prosecutors achieve their goals which are sometimes inconsistent with obtaining conviction of an offense which could serve as a RICO predicate act. For example, a defendant may be allowed to plead to a lesser included non-RICO offense, immunity may be offered to achieve a more important objective or a decision may be made not to prosecute for sound and practical reasons. In each of these cases the civil RICO action would be sacrificed and lost forever, a victim of competing legitimate governmental interests.

In addition, in all candor it must be recognized that criminals from time to time are never convicted because of some defect in the trial process or a new expanded interpretation of criminal law and procedure revealed for the first time on appeal. Also, assets could be irretrievably lost or hidden during the time of a grand jury investigation even assuming that an injunction to prevent such activity is obtained after an indictment is issued.

The result of all this is that a criminal conviction requirement is a most uncertain and impractical prerequisite to the maintenance of a civil RICO lawsuit. The ends of criminal RICO are not totally consistent with civil RICO's purpose of providing a civil remedy for those injured by reason of a violation of the activity proscribed by the Act.

Question No. 5

Should equitable remedies be available to the private claimant, in addition to treble damages and recovery of attorney's fees?

Answer: The FDIC's experience under the RICO statute has not yet conclusively shown that equitable remedies, in addition to treble damages and attorney fees, are necessary or useful to achieve the purpose of civil RICO. While conjecture might allow for the advantages of injunctions and divestiture of business interests, dissolution or reorganization of the enterprise, the FDIC would decline to take a position on this proposal at this time.

Question No. 6

What should the burden of proof be in private civil RICO suits -- "preponderance of the evidence," or "clear and convincing evidence"?

Answer: The RICO statute does not specify which burden of proof formula is to be used in private civil RICO lawsuits. One alternative to the traditional civil standard of "preponderance of the evidence" has been proposed in the form of the more rigorous "clear and convincing evidence" standard traditionally used in criminal prosecutions.

We see nothing troubling with maintaining the traditional "preponderance of the evidence" standard for civil RICO, even if the predicate RICO Acts are based on activity which is indictable under criminal statutes. The proposition that the "preponderance of the evidence" standard is entirely appropriate in civil cases involving conduct amounting to criminal activity has existed at least since the Nineteenth Century. See 62 A.L.R. 1449. Also, the rule in a majority of the states seems to be that fraud may be proven by a preponderance of the evidence even where the fraud alleged in a civil action also constitutes a criminal offense. To the extent that the RICO action is civil, there is nothing out of the ordinary in relying on a preponderance of the evidence. Even though civil RICO is grounded on activity which is considered criminal, the suit itself is still a civil suit. To the extent that a more strict standard has historically been used only because deprivation of liberty, as opposed to property, is involved, it would seem inconsistent to impose a criminal burden of proof in a civil context.

Further, treble damages are also assessed in antitrust actions on the basis of a preponderance of the evidence. Imposition of the stricter criminal standard in RICO context simply because of the treble damage element would also not seem to be justified.

Question No. 7

Should involvement of organized crime be required as an element of proof?

Answer: Involvement with "organized crime" should not be required as an element of civil RICO proof. The concept has been widely rejected for obvious legal and practical reasons. When Congress originally considered RICO it was determined that punishing membership in an organization would unconstitutionally prohibit a "status". *Robinson v. California*, 370 U.S. 660 (1962) and *Scales v. United States*, 367 U.S. 203 (1961). Requiring a tie to that undefinable class of "organized crime" would be impossible and would render the statute ineffective.

Congress understood that RICO was not intended to be exclusively aimed at "the Mafia" or "LaCosa Nostra" but at smaller groups of organized criminals as well. *See*, remarks of Senator McClellan at 116 Cong. Rec. 18,940 (1970). The FDIC is concerned with *all* groups engaging in organized criminal activity which may contribute to bank failures.

We will be pleased to provide you with any additional information or assistance you may require.

Sincerely,

Daniel W. Persinger ca

Daniel W. Persinger
Deputy General Counsel

The **Chairman**. Our last witness is Mr. Anthony J. diBuono.

I have got to open the Senate at 10 o'clock so we just have about 6 minutes. If you could give us the thrust and we will put your entire statement in the record.

STATEMENT OF ANTHONY J. diBUONO, VICE PRESIDENT/GENERAL COUNSEL, COLT INDUSTRIES, INC., NEW YORK, NY

Mr. **diBuono**. My name is Anthony diBuono. I am senior vice president and general counsel of Colt Industries, Inc.

In February 1984, my company and the company's officers were sued for, among other things, engaging in a fraudulent scheme by using the mails and wire communications and interstate commerce. The fraudulent scheme was a labor dispute concerning the rights of certain retirees to benefits under a collective bargaining agreement—the company taking the position that no such rights were granted, and the union, quite naturally, taking the opposite position.

The lawsuit instituted as a class action alleged claims in violation of section 301 of the Labor Management Relations Act and breach of fiduciary duties under the Employees' Retirement Income Security Act. It also alleged violations of RICO, using the mails and wires in interstate commerce to fraudulently deprive the retirees of their benefits.

Outside counsel retained to defend the company at first stated that the RICO treble damage claims were without merit and were easily disposable. While clearly the civil RICO claims were without factual merit, counsel concluded, after further research, that they were not so easily disposable because of the great breadth of the language used in drafting the statute and the expansive interpretation of that language by certain courts.

I am sure Congress, in enacting the civil RICO provisions, did not intend such a result as we have today. I am well aware of the dearth of legislative history surrounding these provisions. Indeed, it is precisely the lack of a legislative history that has created the problems that this committee is confronting today.

But whether or not one agrees with the court's interpretations in the *Sedima* and *Oroco* cases as to the prior criminal conviction requirement or the necessity for a special racketeering enterprise injury, it is clear that in 1970 the Congress was concerned with addressing the problem of organized criminal activity and not seeking to create new ways to deal with ordinary business or contractual disputes.

Although it is certainly the role of the courts to do so, it is less important for this committee to divine the intent of the 91st Congress than it is to defend a tenable and workable scheme for civil RICO, one that will eliminate the many abuses that are commonly acknowledged to have grown up in recent years.

I want to emphasize here, Mr, Chairman, that what my company recommends is a "workable" civil RICO system. It is not the desire of Colt Industries to eliminate or weaken civil RICO. We believe that a plaintiff should have a right to sue for treble damages where organized racketeering has deprived the plaintiff of his rights and property. This is a legitimate and potentially very effective method of reducing the profitableness—and therefore the attractiveness—of organized criminal activity.

For that reason, some of the proposed solutions to the problems that have arisen may not be practicable. The requirement of a prior conviction of two predicate offenses as a condition of bringing a civil RICO action or permitting only the Government to bring civil RICO actions may be too restrictive. Such approaches could either emasculate or render significantly less effective a desirable weapon against organized crime.

Mr. Chairman, there may be other solutions to the problem. My company is not wedded to any particular one. I come to urge a change in the statute because of my personal experience. Legitimate businesses subjected to the vagaries of the marketplace—and legitimate businesses do get into legitimate business disputes—should not be further threatened in civil litigation by a treble damage RICO action where such a remedy was clearly never contemplated and is certainly inappropriate.

Appreciating the issue, your committee, Mr. Chairman, is in the best position to draft the changes in the law that will preserve this weapon against crime and, at the same time, relieve legitimate business from this menace. So I ask you, sir, to proceed to enactment with all possible promptness and end soon the confusion surrounding the current law as currently interpreted.

Thank you, sir.

The **Chairman**. Thank you very much. Your appearance here has been very helpful to the committee and we appreciate your coming.

Now, we have a few questions which we will get to you to answer for the record, if you will.

Mr. **diBuono**. I certainly will.

[Prepared statement and responses to questions follow:]

Colt Industries

Statement of

ANTHONY J. DiBUONO, ESQUIRE
SENIOR VICE PRESIDENT, GENERAL COUNSEL
COLT INDUSTRIES INC.

My name is Anthony diBuono. I am Senior Vice President and General Counsel of Colt Industries Inc. In February 1984, my interest in civil RICO was changed from disinterested observer of the reach of RICO in civil securities litigation into an active involvement in determining the scope of RICO. For it was in February 1984 that my company and the company's officers were sued for, among other things, engaging in a fraudulent scheme by using the mails and wire communications in interstate commerce. The fraudulent scheme? It was a labor dispute concerning the rights of certain retirees to benefits under a collective bargaining agreement -- the company taking the position that no such rights were granted; and the union, quite naturally, taking the opposite position.

The lawsuit, instituted as a class action, alleged claims in violation of Section 301 of the Labor-Management Relations Act and breach of fiduciary duties under the Employees Retirement Income Security Act. It also alleged violations of RICO -- using the mails and wires in interstate commerce to fraudulently deprive the retirees of their benefits.

Outside counsel, retained to defend the company, at first stated that the RICO treble damage claims were without merit and were easily disposable. While clearly the civil RICO claims were without factual merit, counsel concluded after further research that they were not so easily disposable because of the great breadth of the language used in drafting the statute and the expansive interpretation of that language by certain courts.

The litigation has been settled subject to the obtaining of favorable rulings from the Internal Revenue Service, but I can assure you the company's actions in settling the case were influenced by the RICO causes of action. In view of the well-known, broad judicial interpretations I have just noted, the threat of a huge treble damage award against the company -- should the court disagree with the company's view in what was nothing more than a legitimate business dispute -- could not be ignored.

Civil causes of action under RICO are only limited by the imagination of the plaintiffs' attorneys. I can assure you that my imagination has conjured up civil RICO actions that have not been pleaded as yet. In light of the current state of affairs, for example, almost any contractual situation involving communication via telephone or the mails -- and we are here talking about essentially every contract -- is fair game for a RICO action.

I am sure that Congress in enacting the civil RICO provisions did not intend such a result as we have today. I am well aware of the dearth of legislative history surrounding these provisions. Indeed, it is precisely the lack of a legislative history that has created the problems that this Committee is confronting today. But whether or not one agrees with the courts' interpretations in the Sedima and Haroco cases as to the prior criminal conviction requirement or the necessity for a special racketeering enterprise injury, it is clear that in 1970 the Congress was concerned with addressing the problem of organized criminal activity and not seeking to create new ways to deal with ordinary business or contractual disputes.

Perhaps, though, too much time is being spent looking back to 1970. Although it is certainly the role of the courts to do so, it is less important for this Committee to divine the intent of the 91st Congress than it is to define a tenable and workable scheme for civil RICO -- one that will eliminate the many abuses that are commonly acknowledged to have grown up in recent years.

I want to emphasize here, Mr. Chairman, that what my company recommends is a "workable" civil RICO system. It is not the desire of Colt Industries to eliminate or weaken civil RICO. We believe that a plaintiff should have a right to sue for treble damages where organized racketeering has deprived the plaintiff of his rights and property. This is a legitimate and potentially very effective method of reducing the profitableness -- and therefore the attractiveness -- of organized criminal activity. For that reason, some of the proposed solutions to the problems that have arisen may not be practicable. The requirement of a prior conviction of two predicate offenses as a condition of bringing a civil RICO action or permitting only the government to bring civil RICO actions may be too restrictive. Such approaches could either emasculate or render significantly less effective a desirable weapon against organized crime.

As an alternative, the Committee might consider focusing upon the broad list of predicate offenses in §1961 -- which run the gamut from bribery to trafficking in contraband cigarettes -- and deleting therefrom mail and wire fraud as bases for private civil RICO actions -- leaving the government's rights in these areas untouched. It is my perception from my examination of this issue that such a modification would substantially reduce the ability of litigants to abuse this statutory remedy without weakening it in any way.

Mr. Chairman, there may be other solutions to this problem. My company is not wedded to any particular one. I come to urge a change in the statute because of my personal experience. Legitimate businesses, subjected to the vagaries of the market place -- and legitimate businesses do get into legitimate business disputes -- should not be further threatened in civil litigation by a treble damage RICO action where such a remedy was clearly never contemplated and is certainly inappropriate.

Appreciating the issue, your Committee, Mr. Chairman, is in the best position to draft the changes in the law that will preserve this weapon against crime and at the same time relieve legitimate business from this menace. So I ask you, Sir, to proceed to enactment, with all possible promptness, and end soon the confusion surrounding the current law as currently interpreted.

Thank you, Mr. Chairman.

ANTHONY J. diBUONO

1. As Counsel for a major business enterprise, how do you feel existing private civil RICO provisions have adversely affected legitimate businesses? Are they even more of a burden to small businesses?

Private RICO claims are usually included as an additional cause of action, and change the entire nature of such commercial litigation. Thus the posture of a defendant in defending and settling the litigation is altered. I feel that to the extent small businesses find themselves as defendants in these cases, since they may be less able to incur the increased costs required to defend against such RICO claims, there is a greater likelihood of settling unmeritorious claims. Private civil RICO provisions literally provide that any two acts of using the mails or wires in interstate commerce to commit fraud give rise to the civil actions. These two acts can be related to the same commercial event (as negotiation of a single contract). Thus the case in which the predicate acts may be used to form the basis of a private civil RICO claim in the event of a contract dispute, would, it seems to me, subject the many commercial business matters in litigation to a private civil RICO claim.

2. Would you favor increasing the burden of proof in private civil cases from "preponderance of the evidence" to "clear and convincing evidence"?

> I think that increasing the burden of proof from a preponderance of evidence to clear and convincing evidence would be helpful. However, since private civil RICO claims are usually additional causes of actions added to the main cause of action, there could be some confusion for juries to apply different standards of proof to separate causes of action.

3. In your statement, you suggest that one possible solution might be the removal of mail and wire fraud from the list of crimes which can serve as the basis of a private civil suit. If RICO were amended to require a crime other than mail or wire fraud, if one of those is alleged, would that address your concerns?

> I am convinced that the amendment of RICO -- for civil actions -- to require a crime other than mail or wire fraud would alleviate my concerns about civil RICO.

The Chairman. This is a very important matter and I think it demands action. We will probably wait until the Supreme Court hands down its decision and then we will proceed with some legislation.

That completes the hearing. Thank you very much.

[Whereupon, at 9:50 a.m., the committee adjourned, subject to the call of the Chair.]

OVERSIGHT ON CIVIL RICO SUITS

WEDNESDAY, JULY 31, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m., in room SD–106, Dirksen Senate Office Building, Hon. Strom Thurmond, (chairman of the committee) presiding.

Also present: Senators Hatch, DeConcini, Specter, Simon, Grassley, Metzenbaum, McConnell, and Biden.

Staff present: Diana Waterman, general counsel; Steve Dillingham, counsel; and Randall Rader, counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

This morning, the committee will conduct a second hearing on the topic of private civil suits which have been filed under the Racketeer Influenced and Corrupt Organizations Act, more commonly called RICO.

On May 20, 1985, this committee held its first hearing on this topic, and received testimony from a former member of this committee, Senator Roman Hruska, and from representatives of the Department of Justice, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and private industry.

Today, we will hear from a second group of distinguished witnesses representing various interests and professions across our Nation.

Much of the impetus for reexamining RICO stems from the sudden proliferation of civil suits being brought under the act and the significant expressions of concern as to whether these suits comport with the original intent of Congress in passing the act. There is general agreement that RICO was intended to eliminate the economic foundation of organized crime and to prevent organized crime from investing in—and thereby corrupting—legitimate business. Whether civil RICO is operating in a fashion that promotes that goal or is in need of reform will be addressed in the testimony of the witnesses today.

The need for examining civil RICO is especially urgent following the recent decisions of the U.S. Supreme Court in *Sedima* v. *IMREX* and *American National Bank & Trust Co.* v. *Horoco,* cases decided July 1, 1985.

In the *Sedima* case, the U.S. Court of Appeals for the Second Circuit had limited application of RICO provisions by requiring criminal convictions as prerequisites to a civil action and requiring a showing of a special injury.

The seventh circuit had ruled in *Horoco* that neither condition was required under RICO. The U.S. Supreme Court upholds the reasoning of the seventh circuit and provides a broad application of civil RICO to business crimes. The majority of the Court, in a 5-to-4 decision, held that any limitations to RICO must come from Congress, not the courts. Many observers feel that this decision will result in an increased number of costly lawsuits unless Congress modifies the existing provisions.

As a result of these recent developments, we are devoting today's hearings to this important matter. The issues presented in this area are very difficult ones. I am hopeful that the testimony of our witnesses today will be helpful in providing information about the current legal situation and potential reform.

Our first witness today is Hon. Frederick C. "Rick" Boucher, a Member of Congress from Virginia, and we will hear from him just as soon as we have had opening statements by the members who are here.

You can come up and have a seat, Congressman Boucher.

The distinguished Senator from Arizona, Mr. DeConcini.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeConcini. Mr. Chairman, thank you very much, and thank you for holding these hearings today on the problems which the civil applications of the Federal RICO statute may have. Last year, I joined you in suggesting that such hearings be held, and you complied with that suggestion, and I am grateful for that. I am particularly pleased, Mr. Chairman, that the National Association of Attorneys General and the National District Attorneys have selected two distinguished Arizona lawyers and public officials to present their views here today—Chief Assistant Attorney General Steven Twist is here representing not only the National Association of Attorneys General, but the attorney general of Arizona, Bob Corbin. I believe that we have a very effective attorney general's office in Arizona, and I understand Mr. Twist has had a great deal to do with that success.

I am also very pleased to present to this committee in a few moments Mr. Steve Neely, who will be a witness. I served with Mr. Neely in the Pima County attorney's office; he succeeded me to that office, and I can with pride say that the office has improved immensely since he took over and now is recognized as one of the outstanding offices.

Last year, during consideration of the Comprehensive Crime Control Act, we were approached by a number of individuals and groups who urged us to take a look at the civil RICO statutes. During that consideration at that time, we concluded that this subject needed separate and at least a couple of days of hearings. Today is our second of these hearings, and I understand that there will be more. I am very interested in the subject matter, because I believe the criminal RICO statutes have probably been the most single effective effort that law enforcement has had to deter organized crime and to break some of that effort. I am not totally familiar with the civil RICO statutes. I obviously know how they function. But I am here with an open mind to see the necessity to either close the loopholes as might be represented, or to even expand the civil RICO statutes.

So I join you, Mr. Chairman, in today's hearings, and I am looking forward to the witnesses.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from Utah, Mr. Hatch.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Mr. Chairman.

At the outset of this hearing, I would like to commend you for scheduling this hearing to investigate the use and abuse of the provisions of the Racketeer Influenced and Corrupt Organizations Act, authorizing the award of treble damages to victims of racketeering activity. RICO has been an effective weapon in society's battle against systemic criminal infiltration of legitimate business activities and enterprises. But as currently applied, particularly in the wake of the Supreme Court case of *Sedima* v. *Imrex Co.* the private treble damage remedy has been distorted. It now is used primarily against the legitimate and reputable businesses, not organized crime activities, and in ordinary commercial disputes.

The distortion of the purpose of RICO has disrupted over 50 years of established legislative and judicial remedies in the commercial fraud cases, including express and implied private remedies under Federal security statutes and remedies under State law.

Moreover, Federal judicial resources have been taxed by the growing burden of resolving garden variety business disputes according to a law enacted to curtail mobster activity. The Racketeer Influenced and Corrupt Organizations Act is instead becoming a "Federal Business Disputes Litigation Act."

When RICO was first enacted, the provisions for civil suits within its purview were little used. In recent years, however, business and contractual disputes have blossomed into extensive Federal litigation of 270 district court civil RICO decisions prior to this year. Only 3 percent, or nine cases, were decided through the 1970's; 2 percent were decided in 1980, 7 percent in 1981, 13 percent in 1982, 33 percent in 1983, and 43 percent in 1984. Now, that is according to the report of the Ad Hoc Civil RICO Task Force of the ABA section of the Corporation Banking and Business Law, 53(a), 55 in 1985. I will call it the ABA report.

As the Sedima court recognizes, the ABA task force that studied civil RICO found that 40 percent of the reported cases litigated under the civil RICO provisions involved security fraud; 37 percent involved common law fraud in a commercial and business setting, and only 9 percent of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals.

This has unfortunately been permitted by the Supreme Court's recent *Sedima* case. The Court's ruling would allow a private RICO action based on nothing more than two allegedly fraudulent mailings, or uses of the wires, occurring within 10 years of each other. For example, a business which transmits two or more accounting errors through the mails within a 10-year period could conceivably be subject to treble damages in a civil suit. Even the Supreme Court concedes in the majority opinion in Sedima that "In its private civil version, RICO is evolving into something quite different from the original conception of its enactors."

Now, these figures indicate that RICO is being used more often to attack than to protect legitimate businesses. This calls for a restructuring of the act to bring it back within the bounds Congress originally contemplated; namely, to make it again a tool against infiltration of organized criminal elements into the legitimate business community. Accordingly, I introduced on Monday S. 1521, the Civil RICO Amendments Act of 1985. S. 1521 has three elements.

First, it would require that at least one act of racketeering activity forming a predicate for a private treble damages suit be an injurious activity other than mail, wire or securities fraud. These three predicate offenses invariably form the basis for civil RICO suits that are unjustified in light of Congress' target in RICO.

Prior to RICO, no Federal statute had expressly provided a private damage remedy based on a violation of the broadly written mail or wire fraud statutes, which make it a Federal crime to use the mail or wires in furtherance of a scheme to defraud.

Moreover, courts of appeals consistently had held that no implied Federal/private courses of action accrue to victims of these Federal violations. The victims instead have the options of bringing actions in State courts.

Now, since the Supreme Court's ruling, two fraudulent mailings or uses of the wires occurring within 10 years of each other might lead to civil RICO liability. In recent years, this has caused an extraordinary expansion in the application of mail and wire fraud statutes to conduct that some had thought was subject only to State criminal and civil law.

The only restraining influence in the inexorable expansion of the mail and wire fraud statutes has been the prudent use of prosecutorial discretion.

In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing State common law remedies. On the contrary, such litigants, lured by the prospect of treble damages and attorneys' fees, have a strong incentive to invoke RICO's provisions whenever they can allege two instances of mail or wire fraud. The defendant, facing financial exposure and the threat of being labeled a "racketeer," has a strong incentive to settle the dispute. Many a prudent defendant, facing ruinous exposure, would decide to settle even a case with every little merit.

It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat. The civil RICO provision consquently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the States.

The next aspect of S. 1521 requires that a plaintiff prove a "racketeering enterprise injury" to the business that is threatened by mobster infiltration. Thus, private plaintiffs suing under the authority of RICO would have to demonstrate an injury separate from the injury of the predicate acts themselves in section 1961. The language of this provision is taken directly from the dissent in Sedima.

The only way to give effect to Congress' concern is to require that plaintiffs plead and prove that they suffered a RICO injury, injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business or infiltration of a business, or a market through a pattern of racketeering activity. This requirement is manageable, and it puts the statute to the use to which it was addressed. In addition, this requirement is faithful to the language of the statute, which does not appear to provide recovery for injuries incurred by reason of individual predicate acts.

The sentiments of the dissent in Sedima echo the opinion of the Second Circuit Court of Appeals. This aspect of S. 1521, then, is based on important case law, and it is by no means an unmanageable standard. It has been defined by the courts, which have already required such a "racketeering injury."

Finally, this bill allows a judge in his or her discretion to award attorney's fees to the defendant if the judge finds the suit which has been brought to be frivolous. This provision is necessary to discourage would-be plaintiffs from litigating their conventional business and commercial injuries under the auspices of civil RICO.

I should note as well that this bill does not alter that treble damages, attorney's fees or Federal forum provisions of civil RICO. Civil RICO, in my opinion, must remain a potent arrow in our quiver against organized crime. But that arrow has to be more carefully aimed to ensure it hits only its intended target.

The principal target of Congress was the economic power of racketeers and its toll on legitimate businesspeople. To this end, Congress sought to fill a gap in the civil and criminal laws and to provide new remedies broader than those already available to plaintiffs different from those available to government citizens under State and Federal laws, and significantly narrower than those adopted by the court in Sedima.

With S. 1521, I hope we will open a debate that will return RICO to its important mission.

Mr. Chairman, my statement was a little more lengthy than I wanted to make it, but I think it was important to make those points, and I surely do again appreciate your leadership in being willing to hold these hearings on this matter.

The CHAIRMAN. The distinguished Senator from Illinois, Mr. Simon.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Thank you, Mr. Chairman.

I am a new member of this committee, and I intend to learn from the three of you. I am not as knowledgeable as I would like to be in this area. We clearly have to do everything practical we can to strengthen the fight against organized crime. So I look forward to learning from the three of you and from my distinguished former House colleague here, who is our first witness.

Thank you.

The CHAIRMAN. Thank you. Representative Boucher, we will be glad to hear from you now.

STATEMENT OF HON. FREDERICK C. "RICK" BOUCHER, MEMBER OF CONGRESS, STATE OF VIRGINIA

Mr. BOUCHER. Thank you, Mr. Chairman.

As a member of the House Judiciary Committee, it gives me particular pleasure to appear before this distinguished committee today.

I appear this morning in support of legislation which I have recently introduced to amend the civil remedy provision of the Racketeer Influenced and Corrupt Organizations Act, the so-called RICO statute.

I am aware, Mr. Chairman, of your ongoing interest in this area, and that this committee has already held 1 day of hearings on the important subject before us—and for that reason, I will not take the committee's time to review in detail the legislative history of adoption of the RICO statute in 1970, including its original purpose, which was to give the Federal Government added tools to fight organized crime.

I favor strong enforcement of the criminal RICO statute and appear today only to submit arguments endorsing amendments to the civil RICO provision, section 1964(c) of title 18, United States Code.

Recently, many of us in Congress have heard from the business community about the misuse of the civil remedy of the RICO statute. Before 1980, there were only nine reported cases involving the civil RICO remedy; today, there are hundreds.

The scope of RICO generally—the alleged commission of two or more underlying offenses within the past 10 years—is relatively easy to allege and to sustain during the preliminary stages of a lawsuit. The prospects of treble damages and attorney's fees provide additional incentives to plaintiffs to file RICO civil suits. Many of these suits routinely involve broad actions which the Assistant Attorney General Stephen Trott, in testimony before this committee on May 20 of this year, called, conduct bearing little resemblance to organized crime activity in the traditional sense.

The major reason many business groups and professional associations have expressed increasing concern about the use of civil RICO is the apparent absence of safeguards to ensure that the remedy is used only for its intended purpose, compensating those who have suffered financial loss as a consequence of organized criminal activity.

Criminal RICO provisions are subject to formal guidelines issued by the Department of Justice. But civil RICO claims are now added as a matter of course to cases involving securities transactions or alleging some type of commercial fraud. RICO claims also appear in landlord-tenant disputes, in real estate disputes, and even in cases involving matrimonial disputes and disputes among members of religious organizations.

Congress, unfortunately, neglected in 1970 to provide clear legislative direction with regard to the private remedy portion of the RICO statute. Today, the civil RICO provisions are being used almost exclusively against legitimate business activities. The mere threat of a racketeering charge can often force and leverage a settlement on a very insubstantial claim even before a suit is initiated. Once a suit is filed, the continuation of that suit exposes individuals and legitimate businesses to continuing embarrassment, to expense, and to business disadvantage.

Mr. Chairman, as the committee is aware, and as the Senator from Utah indicated in his statement, the U.S. Supreme Court on July 1 reversed the Second Circuit Court of Appeals in the case of *Sedima S.P.R.L.* v. *Imerex Company.* The second circuit had held that a prior criminal conviction is a requirement for a private action under the RICO statute. The Supreme Court reversed, finding an absence of legislative history to support that requirement.

The majority opinion, however, made a number of relevant points, and I would like to quote one of these:

"It is true that private civil actions under the statute are being brought almost solely against such defendants"—meaning legitimate businesses and firms—"rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statutes written, and its correction must lie with Congress."—*Sedima,* 53 U.S.L.W. 5039.

The decision of the Court in *Sedima,* by a narrow 5-to-4 majority, precludes other courts from preventing the misuse of civil RICO. That misuse can now only be addressed by the Congress. And, as indicated above, the Supreme Court has issued a clear invitation to the Congress to take action to address that problem and to revisit the civil RICO provisions.

I take additional comfort, Mr. Chairman, in a statement by a fellow Virginian, Justice Lewis Powell, in his separate dissent to the majority in *Sedima,* where he stated as follows: "* * * it defies rational belief, particularly in the light of the legislative history, that Congress intended this far-reaching result."—*Sedima,* 53 U.S.L.W. 5047.

On July 10, I introduced H.R. 2943, a bill which would amend the civil RICO provision to require a prior criminal conviction before a private civil action can be pursued. Under this bill, a civil plaintiff would have to prove that the defendant violated 18 U.S.C. 1962 by engaging in a "pattern of racketeering activity." The plaintiff would also be required to prove that the defendant has been convicted of either a RICO violation or of one of the "predicate acts," and that the plaintiff was injured by the defendant's violation of section 1962. Finally, the plaintiff would have to bring his action within 1 year after the date of the latest conviction of the defendant either under RICO or for the predicate offense on which the plaintiff relies as satisfying the prior criminal conviction requirement.

I am pleased to report, Mr. Chairman, that the ranking minority member on the House Judiciary Committee, Mr. Fish of New York, and two other senior Republican members of the committee, Mr. Gekas and Mr. Hyde, have joined as original cosponsors of this bill. Hearings have already been held in the House Criminal Justice Subcommittee, and I personally believe that the chances of moving to markup on this measure and obtaining favorable action in the House at this time appear excellent.

In closing, Mr. Chairman, I urge the committee to support legislative changes to the civil RICO statute. I think the private action remedy of the RICO law should be narrowed by requiring a prior criminal conviction. This simple and clearcut approach will, as Mr. Justice Powell observed in his dissent in the *Sedima* case, confine the reach of civil RICO "to the type of conduct Congress originally had in mind."

I thank the committee for its attention to these comments, and I will be very pleased to answer your questions.

The CHAIRMAN. Congressman Boucher, as you are aware, the civil RICO provisions have been used in recent years to challenge a wide range of alleged business and securities frauds. Your recommendations, as I understand them, will require criminal convictions for the required "predicate acts" prior to bringing a private action.

Please give us your opinion on the advisability of limiting the requirement of "predicate acts" only to mail, wire and securities fraud, the areas of most frequent alleged abuse.

Mr. BOUCHER. Mr. Chairman, I think there are any of several ways that this problem can be addressed. I prefer the approach of requiring that there be a prior criminal conviction either of a RICO charge itself, or of one of the "predicate acts," before the civil remedy can be pursued. And I think there are several points that commend that approach.

First of all, it is clean and simple, and I think whatever the Congress does at this point should have the virtue of simplicity. Requiring a criminal conviction as a condition for instituting a civil action has that virtue.

Second, we must bear in mind the main purpose of the RICO law as enacted in 1970 which was to permit the Government to have new tools to go after organized crime. The main purpose of adding a civil component to that criminal remedy was to provide compensation to people who had been injured as a consequence of organized criminal activity. I personally can think of no better way to demonstrate that organized criminal activity has been involved, rather than some kind of legitimate business as in the suits that we are seeing today, than requiring a criminal conviction as a predicate to filing the civil suit. I think it has that virtue as well.

Finally, Mr. Chairman, I am very much aware of your concern, and a concern that I share, regarding the state of the overcrowded dockets in Federal courts today. One favorable consequence of enacting legislation along the lines recommended today would be reducing by some degree the amount of litigation in the Federal courts. And I think requiring a criminal conviction for that end would serve that purpose.

Now, let me add that if we limit the prior conviction requirement just to cases involving mail fraud, wire fraud, or securities fraud, we are perhaps addressing as many as 80 percent of the cases that have been filed to this point. So I would concede that that would be a substantial remedy in and of itself, and would clearly improve upon the condition of current law. But it would not address the other 20 percent of the cases. And for that reason, I think that we should go all the way, now that we have this opportunity, and require a prior criminal conviction with respect to every civil case that is filed.

The **Chairman**. Congressman Boucher, what do you feel are the chances on the House side for bipartisan support of your proposed legislation?

Mr. **Boucher**. We already have a strong indication, Mr. Chairman, of bipartisan support. As I indicated in my statement, the original cosponsors of my proposal are Mr. Fish, Mr. Gekas, and Mr. Hyde, senior Republicans on the House Judiciary Committee. I myself am a Democrat. And we are working now to obtain additional Democratic cosponsors I think our chances of doing that are excellent.

We have held 1 day of hearings in our Criminal Justice Subcommittee in the House. My understanding is that we have an excellent chance of obtaining markup and having the legislation favorably acted upon in the House. So I think that should be good news to this committee, that the House is proceeding, and that we can anticipate favorable action there in the near future.

The **Chairman**. The distinguished Senator from Illinois.

Senator **Simon**. Thank you, Mr. Chairman.

Just one question. I note that you say the plaintiff would have to bring his action within 1 year after the date of the latest conviction of the defendant, either in RICO or for the predicate offense.

Is a 1-year limit too restrictive?

Mr. **Boucher**. I would say to the distinguished Senator that I have no pride in authorship, with respect to the statute of limitations portion, or indeed, any portion of the bill, and I think that a case, in fact, could be made for a different statute of limitations period.

The central point that we are trying to address is the very broad misuse of the civil RICO provision today to harass, threaten, and intimidate legitimate businesses. And I for one would be very pleased if we could simply pass legislation to limit that use of the statute by having a prior criminal conviction as a required element of the case.

I think that some reasonable statute of limitations needs to be imposed, but I think it would be perfectly appropriate to adopt the 2-year statute of limitations which is contained in most State law negligence cases.

I would say to the Senator that I certainly would have no objection to having that amended to provide some different statute of limitations.

Senator **Simon**. I thank you.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

The distinguished Senator from Utah.

Senator **Hatch**. I want to thank you for the leadership you are providing in the House and in the Congress on this issue.

One thing I want to call your attention to in regard to your bill—and I am willing to work with you and Members of the House and everybody else in coming up with whatever it takes to resolve what I consider to be some very unjust results and potential results.

One of the problems is that the ABA Task Force carefully considered the arguments concerning a requirement of a prior conviction for one or more predicate offenses as a prerequisite for a civil RICO action. The ABA Task Force did not endorse that particular proposal because it felt that the prior conviction requirement could cause severe practical problems. For instance, a business could be severely damaged by an organized criminal who has never been convicted, perhaps either because of prosecutorial discretion, or the fact that he may have been a witness or had immunity, or any number of reasons, that business would be without a RICO remedy. And that is one of the problems that is worrying me a little bit about the approach you are taking.

If you talk in terms of other practical problems, which the ABA study, I think, mentioned, like what happens when a mobster who has harmed a business entity but has escaped prosecution—maybe due to plea-bargaining or prosecutorial discretion or missing witnesses, or any other such practicality that may arise—should he be able to escape civil liability as well? I do not believe he should be. I think the purpose of the bill is to really come down hard on racketeers and mobsters.

I agree with your purpose. I really want to accomplish that and want to work with you on it.

So I would just point out those two sets of illustrations, just to indicate why I am coming from where I am coming from on the bill that I have introduced.

But again, I want to thank you for the leadership you are providing and the effort you are making, and I intend to work with you and anybody else we can to resolve this problem.

Mr. BOUCHER. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Iowa, Mr. Grassley.

Senator GRASSLEY. Mr. Chairman, I have two questions, but before I do that, I have a short statement I would like to put in the record.

The Chairman. Without objection, so ordered.

[The statement follows:]

OPENING STATEMENT BY SENATOR CHARLES E. GRASSLEY

Thank you Mr. Chairman. I want to commend you on convening this hearing on the Racketeer Influenced and Corrupt Organizations Act (RICO), and in particular its fraud section.

Mr. Chairman, there is no more insidious element in our modern society than organized crime. Its roots go deep into legitimate organizations and businesses as well as into criminal enterprises. Because these modern-day "thugs" often wear business suits and have respectable titles and organizations, the war against organized crime has often been defeated in a tangled web of legal technicalities.

Last year I chaired the Judiciary Committee's hearings on the President's Commission on Organized Crime and at the time, discussed with Judge Kaufman, the Commission's Chairman, that I had seen several wars on organized crime come and go with little effect, and that I hoped that the outcome of his investigation would be more fruitful.

In order to be more effective against criminals that have invaded legitimate enterprises, the Racketeer Influence and Corrupt Organization Act (RICO) was adopted. Now, however, RICO is being used in some instances to harass and intimidate some business organizations and individuals who have committed no crime.

I welcome this opportunity to explore ways in which Congress can clarify the law so that it is used only against criminals and their enterprises, while at the same time, not requiring such high thresholds of proof, nor such limited scope that organized crime again escapes prosecution.

Senator **Grassley**. There is one thing that I would like to have you respond to, if you could, and if you do not feel like you can respond to it now, then maybe you could submit it in writing.

In the majority opinion of the *Sedima* case, the Supreme Court indicated that a prior conviction requirement—and this is where I am quoting—"would result in pursuit of stale claims, complex statute of limitation problems, or the wasteful splitting of actions, with the resultant claim and issue preclusion complications."

I would like to have your response to those contentions, that is whether or not you see those as a problem.

Mr. **Boucher**. I think, Senator, one reason that the legislation I have offered contains its own specific statute of limitations is to address that very problem. It requires that the civil suit be brought, if at all, within 1 year of the conviction under RICO or of the predicate act, whichever occurs later, and for that reason would clearly address the problem of having stale claims filed.

Now, the Senator from Illinois has suggested that some other statute of limitations might be appropriate, and I would agree that consideration could be given to a different statute. But I think it is important that some statute of limitations be set forth, referencing the conviction of the "predicate act" or of the RICO violation, to ensure that the very problem you are discussing does not arise.

Senator **Grassley**. Then, my second and last point would be also not so much a direct question, but just asking you to respond to what, it seems to me, is the very purpose of civil RICO actions, which is to fill prosecutorial gaps, or to provide for private attorneys general actions where the Government has, for various reasons, chosen not to criminally prosecute.

Do you generally agree?

Mr. **Boucher**. I generally agree that that is a legitimate purpose of the statute. On the other hand, let us look at the history of what has occurred. We had the very distinguished former Chairman of the Federal Communications Commission before our House committee when we had our hearings, Mr. Newton Minnow, who is something of an authority in this field.

He indicated that based upon his experience spanning the last 15 years in which the RICO statute has been in existence, he is aware of no cases against organized crime figures or businesses being pursued to a successful conclusion. So in fact, the civil RICO provision has not had the purpose for which it has been intended, that purpose has not been pursued. It has been used almost exclusively to threaten, harass, and intimidate legitimate businesses.

Senator **Grassley**. Thank you, Mr. Chairman.

The **Chairman**. Thank you.

Mr. Boucher, thank you very much.

Our next witnesses comprise a panel, consisting of: Mr. Ray J. Groves, chairman, American Institute of Certified Public Accountants, Washington, DC; Mr. Theron H. Peace, certified public accountant, West Columbia, SC, and Mr. Robert H. Hodges, Jr., executive vice president and general counsel of the South Carolina Bankers Association of Columbia, SC, on behalf of the American Bankers Association.

We are very pleased to have you gentlemen with us.

Please identify the other two gentlemen accompanying you.

Mr. **Groves**. Mr. Chairman, they are with the American Institute of CPA's. We have Ted Barreaux, who is our vice president of the Washington office, and we have Eric Holtman, who is our special counsel.

The **Chairman**. Yes. Two of these gentlemen have worked with us before, and we are pleased to have you back with us again. As counsel to the committee previously, I am sure you feel at home here among this group. We are glad to have you both.

All right. Mr. Groves, please proceed. And I wonder if you could take about 5 minutes, because our questions will bring out a lot of things. Just give the thrust of your statement, and we will place your entire statements in the record, if that would be agreeable with you.

STATEMENT OF A PANEL, INCLUDING: RAY J. GROVES, CHAIRMAN, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, WASHINGTON, DC, ACCOMPANIED BY THEODORE C. BARREAUX, VICE PRESIDENT OF THE WASHINGTON OFFICE, AND ERIC HOLTMAN, SPECIAL COUNSEL; THERON H. PEACE, CERTIFIED PUBLIC ACCOUNTANT, WEST COLUMBIA, SC, AND ROBERT H. HODGES, JR., EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, SOUTH CAROLINA BANKERS ASSOCIATION, COLUMBIA, SC, ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION

Mr. **Groves**. Yes, sir. Thank you, Mr. Chairman and members of the committee. I am Ray Groves, the chairman of the American Institute of Certified Public Accountants. The AICPA is the national professional organization of CPA's in the United States, and we have been in that capacity for just about 100 years. We have over 230,000 members. They are in public practice, industry, education, and government. And we serve in effect millions of individual clients and businesses throughout the country.

Thank you for placing my entire statement in the record. We certainly appreciate that, and we also have an appendix which we would like to go in the record, too.

The **Chairman**. Without objection, so ordered.

Mr. **Groves**. Mr. Chairman, as you noted in a recent speech, Congress from time to time encounters a need to reexamine a statute to ensure that it is being implemented according to congressional intent. You went on to note that the private civil RICO provisions have been interpreted and applied in ways which necessitate further congressional scrutiny.

Speaking through the Vice President's task force on financial services, the Reagan administration has recognized that the civil RICO statute is being abused and needs to be reformed.

Attorney General Meese, in response to a question posed at hearings before this committee in April, stated that the Justice Department had been analyzing the use of this statute by private parties and "may be coming before the Congress with some legislation to modify the statute."

The need to reexamine civil RICO has gained greater urgency just in the last month when, as mentioned earlier today, the U.S. Supreme Court ruled that the courts do not have the power to cure the abuse of civil RICO by private parties by narrowly interpreting its open-ended language. The Court unanimously agreed that civil RICO had come to be used in a manner not envisioned by Congress, but a bare majority of the Court held that whatever defect in the language of RICO leads to this misuse is, as the majority opinion put it, "inherent in the statute as written and its correction must lie with Congress."

We commend this committee for undertaking this significant review of the civil RICO provisions. We can think of no case which so perfectly fits your standard for revisiting a statute to determine if its use conforms with congressional intent.

At the outset, the AICPA would like to state clearly and without equivocation that we are not—and I repeat, we are not—in favor of weakening the criminal sanctions directed against organized crime as contained in the Organized Crime Control Act of 1970, or as it was amended in 1984. To the contrary, we would enthusiastically support enhanced sanctions against such activities.

Moreover, we fully support properly constructed civil remedies against organized crime, including the application of civil RICO provisions. But the AICPA does call for congressional action to redirect the RICO statute to its intended purpose of attacking organized crime.

The legislative history of RICO is discussed in my written statement, and I will just say in summary that the legislative history of civil RICO confirms that Congress intended to create a weapon in the war against organized crime, but at no time did Congress envision that it was creating a powerful new weapon to be used against legitimate business people in ordinary commercial disputes having nothing whatsoever to do with organized crime.

In fact, though, that is precisely how civil RICO is being used. This committee is well aware of the structure of a RICO claim, and it would serve no useful purpose to detail all of its elements.

To explain how civil RICO has come to be so distorted and abused, I should merely note that the commission of any two prescribed acts within a 10-year period may trigger the statute and the availability of the treble damage claim. Some of these so-called "predicate offenses" are those of a hardcore nature, often associated with organized crime—murder, kidnaping, exortion and arson. But also included are some offenses subject to broad interpretation such as mail fraud, wire fraud, and fraud in the sale of securities. Allegations of fraud can be easily framed in almost any business transaction gone awry, and this is exactly what has happened in the RICO arena. The statute is now being invoked in every kind of litigation, where a disgruntled investor, purchaser, or business associate can possibly allege that another party to the transaction did not deal fairly with him.

In fact, the use of civil RICO becomes more ludicrous every day, encompassing breach of contract actions, commonplace landlord-tenant or real estate disputes, product liability, wrongful discharge, et cetera.

Among those who have found themselves targeted by racketeering allegations have been this Nation's leading and most respected accounting firms, banks, insurance companies, securities firms, and many other legitimate businesspeople. The result has been, as Justice Marshall wrote for four members of the Court in the recent *Sedima* decision—and the other five Justices did not dispute this point—to "quite simply revolutionize private litigation." Civil RICO has disrupted the system of civil litigation in two major respects. First, it has federalized large portions of law traditionally reserved to adjudication in the State courts under State law. Second, it allows plaintiffs to bypass carefully structured systems of rights and remedies in such areas of Federal law as securities regulation.

In the wake of the Supreme Court's recent decisions in *Sedima* and *American National Bank and Trust,* the invocation of RICO against what Assistant Attorney General Trott called in his earlier testimony on civil RICO before this committee, "conduct bearing little resemblance to organized crime activity in the traditional sense" is almost certain to accelerate.

To eliminate the well-documented and widely recognized abuses of civil RICO and to refocus the statute on its intended targets, Congress should permit civil claims under RICO to proceed only after the defendant has been convicted of a RICO offense, or at least, of "predicate offenses." Such an amendment would confine the situations in which suits can be filed to those in which public prosecutors have screened those people who may fairly be charged with being involved in real criminal activity from those who should not be subject to accusations of racketeering.

I emphasize that if Congress enacts this kind of amendment, persons allegedly injured by conduct that has not led to criminal prosecution and conviction would still have available all of the other Federal and State law remedies that apply to commercial disputes in alleged torts.

The prior criminal conviction requirement would be the most direct and precise way to return RICO to its intended use as a weapon against career criminals and its abuse as a weapon in ordinary commercial litigation would end.

Thus, the need for reform is clear. Congress should move promptly to amend the civil provisions of RICO, to restore the private remedy to its original purpose as an additional weapon against organized crime, while curing its current capacity to inflict harm and unreasonable costs on legitimate businesses.

We thank you for the opportunity to testify, and we would be pleased to answer your questions.

[The statement follows:]

STATEMENT OF

RAY J. GROVES, CHAIRMAN

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Mr. Chairman, Members of the Committee, I am Ray J. Groves, Chairman of the American Institute of Certified Public Accountants. Accompanying me are Philip B. Chenok, President of the Institute, Theodore C. Barreaux, the AICPA Vice President in charge of our Washington office, and AICPA Special Counsel Philip A. Lacovara of Hughes Hubbard & Reed.

The AICPA is the national professional organization of certified public accountants (CPAs) in the United States. Its service to the profession and to the public spans almost one hundred years. Today, membership consists of over 230,000 CPAs in public practice, in industry, in education and in government. The Institute is widely recognized as the authoritative voice of the accounting profession.

Mr. Chairman, as you noted in a recent speech, Congress from time to time encounters a need to reexamine a statute to ensure that it is being implemented according to Congressional intent. You went on to note that the private civil RICO provisions have been interpreted and applied in ways which necessitate further Congressional scrutiny. Speaking through the Vice President's Task Group on Financial Services, the Reagan Administration has recognized that the civil RICO statute is being abused and needs to be reformed. Attorney General Meese, in response to a question posed at hearings before this Committee in April, stated that the Justice Department had been analyzing the use of this statute by private parties and "may be coming before the Congress with some legislation to modify the statute."

The need to reexamine civil RICO has gained greater urgency just in the last month, when the United States Supreme Court ruled that the courts do not have the power to cure the abuse of civil RICO by private parties by narrowly interpreting its open-ended language. The Court unanimously agreed that civil RICO had come to be used in a manner not envisioned by Congress, but a bare majority of the Court held that whatever defect in the language of RICO leads to this misuse is, as the majority opinion put it, "inherent in the statute as written, and its correction must lie with Congress."

We commend this Committee for undertaking this significant review of the civil RICO provisions. We can think of no case which so perfectly fits your standard for revisiting a statute to determine if its use conforms with Congressional intent.

At the outset, the AICPA would like to state clearly and without equivocation that we are not in favor of weakening the criminal sanctions directed against organized crime as contained in the Organized Crime Control Act of 1970 or as it was amended in 1984. To the contrary, we would enthusiastically support enhanced sanctions against such insidious activities. Moreover, we fully support properly constructed civil remedies against organized crime, including the application of civil RICO provisions. But the AICPA does call for Congressional action to redirect the RICO statute to its intended purpose of attacking organized crime.

The bill from which the Organized Crime Control Act of 1970 (including the RICO title) was derived originated in the Senate and contained no private civil RICO provision when introduced or when initially passed by the Senate. The object of the legislation was to enhance the federal government's arsenal in the war against organized crime, not to create new remedies for commercial disputes. This Committee's Report on the bill clearly stated the bill's precise purposes:

> "The eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

S. Rep. No. 617, 91st Cong., 1st Sess. 2 (1969).

In this vein, Senator McClellan, the chief sponsor, focused his arguments for the bill on the activities of "La

Cosa Nostra." In particular, he was concerned that when "organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which is used in its illegal business." 115 Cong. Rec. 5872 (1969). There was concern, however, that any attempt to define "organized crime" per se in the statute -- as Senator McClellan had attempted to do in earlier legislation introduced in the 90th Congress -- would encounter constitutional difficulties. Accordingly, Senator McClellan instead endorsed an approach that would create a broad list of predicate offenses, including various types of fraud, because organized crime had shown great flexibility in branching into additional illegal activities and "if we name one crime they will commit another." Congress, the Senator explained, could not "anticipate everything;" it would "have to make a statute general." 116 Cong. Rec. 845-846 (1970).

Under this approach, the Department of Justice, which was to have exclusive authority to enforce this criminal statute, would thus have the power and the responsibility to channel the statute against its intended target: organized crime. Significantly, when this Committee broadened the statute to include mail fraud, wire fraud, and securities fraud as predicates that could give rise to RICO prosecution, the bill still provided for enforcement solely in cases prosecuted by the Justice Department.

These broad provisions, therefore, could not have been intended to expose legitimate businessmen to massive private suits, since the Senate bill did not even authorize private suits. With little discussion, however, the House Judiciary Committee later added the private civil remedy, including its provision for treble damages and attorney's fees. No one involved in proposing that amendment, however, suggested that it was to revolutionize federal law applicable to business or securities transactions or was to federalize local commercial disputes. Vividly illustrating the view that this addition did not alter the essential nature of the bill, the Committee's report devoted only a single, bland sentence to the new provision:

> "The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970).

In the House debates that led to passage of the bill as reported, the Members gave scant attention to this aspect of the bill. Instead, the debate was dominated by controversy over the breadth of the enforcement powers being conferred upon the government, not only in the RICO title but in other provisions as well. See generally 116 Cong. Rec. 35,191-217, 35,287-363 (1970). The House, too, in evaluating the RICO provisions, was mainly concerned with the infiltration of organized crime figures into businesses across the nation. Thus, Congressman Poff, a leading proponent of the legislation, pointed to the takeover of a jukebox business by "a mafia boss" as an illustration of the general understanding that RICO was meant to prevent organized crime from injuring legitimate business people. 116 Cong. Rec. 6709 (1970).

Since the amended bill returned to the Senate near the adjournment of the Congress, the Senate accepted it without a conference. This chamber did so, however, without any suggestion that the focus of Congressional concern had shifted in the slightest from the goal of punishing hard-core criminals through federal prosecution. Indeed, Senator McClellan described the House amendments, including the addition of the provision for private civil suits, as relatively "minor changes." 116 Cong. Rec. 36,293 (1970). At no time did any supporter of the RICO bill ever suggest that the private civil remedy was intended for use against legitimate business people, corporations, and licensed professional partnerships, or was to be used in commercial disputes having nothing whatsoever to do with the activities of what was and is commonly understood as "organized crime."

In fact, though, that is precisely how civil RICO is being used. The insertion of a broad private right of action into the sweeping, Senate-passed organized crime bill allowed any victim of a pattern of so-called "racketeering activity" to sue in federal court and recover treble damages, plus attorney's fees. With increasing frequency, this seemingly meritorious device for redressing the injuries inflicted by organized crime has been turned against ordinary businesses -- the very people the act intended to protect. Among those who have found themselves targeted by "racketeering" allegations -- and please remember it only needs to be alleged that criminal violations have occurred -- have been this Nation's leading and most respected accounting firms, banks, insurance companies, securities firms, and many other legitimate business people.

This Committee is well aware of the structure of a RICO claim, and it would serve no useful purpose to detail all of its elements. To explain how civil RICO has come to be so distorted and abused, I should merely note that the commission of any two proscribed acts within a ten year period may trigger the statute and the availability of the treble damage claim. Some of these so-called "predicate" offenses are those of a hard-core nature often associated with organized crime: murder, kidnapping, extortion and arson. But also included are some offenses subject to broad interpretation, such as mail fraud, wire fraud, and fraud in the sale of securities.

Allegations of fraud can be easily framed in almost any business transaction gone awry. And this is exactly what has happened in the RICO arena. The statute is now being invoked in every kind of litigation where a disgruntled investor, purchaser, or business associate can possibly allege that another party to the transaction did not deal fairly with him. Under the criminal mail and wire fraud test, this kind of allegation appears to be sufficient to constitute "fraud". In fact, the use of civil RICO becomes more ludicrous every day, encompassing breach of contract actions, commonplace landlord-tenant or real estate disputes, product liability actions, wrongful discharge from employment cases, matrimonial controversies, political squabbles, and even religious disputes.

The result has been, as Justice Marshall wrote for four members of the Court in the recent Sedima decision -- and the other five Justices did not dispute this point -- to "quite simply revolutionize[] private litigation." Civil RICO has disrupted the system of civil litigation in two major respects. First, it has federalized large portions of law traditionally reserved to adjudication in the state courts under state law. Second, it allows plaintiffs to bypass carefully structured systems of rights and remedies in such areas of federal law as securities regulation; plaintiffs can do this simply by converting a securities law claim into a RICO claim based on two instances of mail or wire fraud.

Moreover, the mere allegation of racketeering activity under the statute is damaging. Few professionals or businesses dependent on maintaining a reputation for integrity dare risk the harm that may result from this type of publicity, even if confident that the litigation would prove unsuccessful. As Justice Marshall explained in Sedima:

> "[M]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils it was designed to combat."

According to comprehensive data recently collected on hundreds of civil RICO cases by the American Bar Association's Special RICO Task Force, 91% of all civil RICO cases rely primarily or solely on the securities, wire or mail fraud predicates of this organized crime statute. Only 9% of all civil RICO cases involve underlying allegations of criminal activity of the type generally associated with professional criminals. The statute thus has become primarily a tool for civil litigants to avoid the carefully crafted limitations of the federal securities laws and to federalize a wide variety of local commercial disputes.

In his testimony before this Committee in May addressing the need for civil reform, Assistant Attorney General Trott of the Department of Justice reported that the Department's own survey of private RICO cases confirmed this pattern of massive abuse. He estimated that, as a result of the increasing use of civil RICO in commercial disputes, the actual number of private cases filed already exceeds 500. According to the Justice Department's calculations, only about 7% of these cases involve either actual organized crime figures or the kinds of criminal conduct common to organized crime syndicates. As Assistant Attorney General Trott concluded:

> "Experience has shown . . . that the instances of private civil RICO's use against traditional organized crime activities are far outweighed by example of its application as a general federal anti-fraud remedy against seemingly reputable businessmen."

Relying on surveys of this type, the Supreme Court accurately remarked in the recent Sedima decision, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors" and that these suits are "being brought almost solely against" what it called "respected businesses" rather than against "the archetypal, intimidating mobster." In the wake of the Supreme Court's recent decisions in Sedima S.P.R.L. v. Imrex Co. and American National Bank & Trust Co. v. Haroco, the invocation of RICO against what Assistant Attorney General Trott called "conduct bearing little resemblance to organized crime activity in the traditional sense" is almost certain to accelerate.

To eliminate the well-documented and widely recognized abuses of civil RICO and to refocus the statute on its intended targets, Congress should permit civil claims under RICO to proceed only after the defendant has been convicted of a RICO offense or of at least one of the predicate offenses. Under the kind of amendment that we urge, a plaintiff bringing a private treble damage action under this special "organized crime" statute should have to prove that:

(1) the defendant violated the provisions of RICO by engaging in conduct that violated 18 U.S.C. § 1962, as is currently required;

(2) the defendant has been convicted either of a RICO violation or of one of the predicate acts based on the conduct upon which the plaintiff bases his civil RICO claim, a new provision;

(3) the plaintiff has been injured by the defendant's violation of Section 1962, as the statute presently requires; and

(4) the civil claim is filed within one year of the latest pertinent criminal conviction, a new provision.

Such an amendment would confine the situations in which suits can be filed to those in which public prosecutors have screened those people who may fairly be charged with being involved in real criminal activity from those who should not be subject to accusations of "racketeering." I emphasize that, if Congress enacts this kind of amendment, persons allegedly injured by conduct that has not lead to criminal prosecution and conviction would still have available all the other federal and state law remedies that apply to commercial disputes and alleged torts. The prior-criminal-conviction requirement would be the most direct and precise way to return RICO to its intended use as a weapon against career criminals, and its abuse as a weapon in ordinary commercial litigation would end.

I am aware that people who are eager to preserve the potent leverage that civil RICO gives them in commercial litigation have repeatedly recited a laundry list of so-called problems with a prior-criminal-conviction requirement. Through repetition -- and because to date these claims have generally gone unanswered -- these assertions have taken on more credence than they deserve. When those so-called problems are examined, however, each evaporates. I do not have the time to go through those objections one by one and explain why they do not carry much weight, but we have done so in our more detailed memorandum on the subject of civil RICO that I am submitting as an Appendix to my statement and I ask that it be included in the record. That memorandum puts to rest the notion that a prior-criminal-conviction requirement would create any insurmountable difficulties or

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

Hearings on Civil RICO

July 31, 1985

"The Authority To Bring Private Treble-Damage Suits Under 'RICO' Should Be Reformed"

APPENDIX TO STATEMENT OF
RAY J. GROVES, CHAIRMAN,
AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS

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THE AUTHORITY TO BRING PRIVATE TREBLE-DAMAGE SUITS UNDER "RICO" SHOULD BE REFORMED

This memorandum details some of the serious problems that have arisen with the authorization for private treble-damage suits under the Racketeer Influenced and Corrupt Organizations ("RICO") title of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 et seq. It explains why reform of those provisions is necessary now, and why the amendment of the private civil action section to establish a prior-criminal-conviction requirement is the best solution available.

I. INTRODUCTION

With little discussion, the House of Representatives in 1970 added the provision for private civil suits to a Senate-passed bill that was primarily designed to give the Department of Justice new criminal enforcement tools to attack "the mob." The Senate had drafted a bill with broad language in order to give the Justice Department adequate latitude in prosecuting persistent offenders, even if they were not members of traditional criminal syndicates. It was expected, however, that the Justice Department, in exercising its enforcement discretion, would be faithful to the expressed congressional purpose to direct the new criminal sanctions against "organized crime," as experienced prosecutors understand that term. The Justice Department, in fact, has adopted formal guidelines to avoid abusive or excessive use of the broad language of RICO, and has exercised discretion in selecting cases for prosecution under RICO. See pp. 46-50, infra.

The provision for private civil suits was added very late in the legislative process and was intended to have the same focus: protecting legitimate businesses from incursions by professional criminals. Congress neglected, however, to include any specific mechanism to confine private civil suits to cases involving the activities of "organized crime."

Private claimants invoking the broadly phrased statute have not shown any of the discipline exercised by the Justice Department in its selective use of this powerful new weapon. As a result, inventive private lawyers seeking treble damages are successfully arguing for the most sweeping interpretation of RICO's broad language and are attempting to apply RICO in contexts far removed from those conceived by the statute's supporters. RICO claims are now added as a matter of course in virtually all cases challenging securities transactions or alleging some type of commercial fraud. RICO also crops up in landlord-tenant and real estate disputes, attorney-client conflicts, and even divorce battles. By contrast, only a tiny handful of the hundreds of cases alleging private civil claims under RICO involve either the people or the conduct that supporters of the bill sought to attack.

Without any of the restraint and responsibility that governs the decisions of public prosecutors, private lawyers are invoking civil RICO on behalf of private clients to level charges of "racketeering" against reputable businessmen and professionals such as investment bankers, brokers, and accountants. Although RICO was intended to protect legitimate business, the statute is now being used almost exclusively to attack established businesses and firms. The threat to bring a "racketeering" charge sometimes coerces settlements before the filing of a RICO complaint, while the actual filing of a RICO complaint exposes businessmen to continuing embarrassment and expense.

The Supreme Court has now held that the courts do not have the authority to stop the misuse of civil RICO, and that only Congress may do so. In its recent decision in Sedima, S.P.R.L. v. Imrex Co., ___ U.S. ___, 53 U.S.L.W. 5034 (July 1, 1985) ("Sedima"), the Court unanimously recognized that RICO is being used in ways unintended by Congress, as a weapon against legitimate businessmen in ordinary commercial disputes. A bare majority of the Court, however, held that this unfortunate result "is inherent in the statute as written, and its correction must lie with Congress." 53 U.S.L.W. at 5039. Thus, the unintended targets of RICO actions have little or no hope of relief from the courts. The misuse repeatedly noted by commentators and courts alike, including now the United States Supreme Court, can only be eliminated by congressional action.

II. THE STRUCTURE OF THE RICO STATUTE PERMITS OVERLY BROAD USE BY PRIVATE PLAINTIFFS

The private civil RICO section is 18 U.S.C. § 1964(c). Under that provision, a person may press a civil RICO claim if he alleges that he was "injured in his business or property by reason of" the defendant's "pattern of racketeering activity." The plaintiff may recover treble damages as well as costs and attorney's fees. The private civil claim under RICO involves three main components.

A. Predicate Offenses: "Racketeering Activity"

Congress doubted that it could adequately define "organized crime" in a criminal statute in a way that would pass constitutional muster. It chose instead to focus on the types of conduct in which organized crime figures engage. The key to RICO coverage is an extensive list of "predicate" offenses that are defined as constituting "racketeering activity." 18 U.S.C. § 1961. These include a variety of violent crimes, such as murder, kidnapping, extortion, and arson -- crimes that one normally associates with organized crime. In addition, because of some indications from the SEC staff that organized crime figures were involved in trafficking in stolen or counterfeit securities and similar kinds of activity, the SEC asked the Senate to expand the list of predicate offenses in its bill to include mail fraud, wire fraud, and "fraud in the sale of securities." *See* p. 30, *infra*.

B. "Pattern" of Racketeering Activity

The commission of at least two predicate acts within a ten year period is defined to be a "pattern" of racketeering activity. The initial step in a plaintiff's civil RICO claim is to assert that a "person" -- including the whole spectrum of legitimate business corporations, associations, partnerships, and their executives -- committed two predicate acts within ten years and thus engaged in a "pattern of racketeering activity."

Unfortunately, this sweeping coverage makes virtually any businessman or business organization a potential target of a RICO claim. Since the two predicate offenses may not need to be separated in time or involve different transactions, a claimant may allege that a single commercial transaction that generates a dispute constitutes a "pattern of racketeering." For example, an investor may allege simply that a securities transaction consisting of two steps involved fraud. This allegation may make out a "pattern of racketeering activity" involving "fraud in the sale of securities." Similarly, a would-be RICO plaintiff may assert that two separate copies of a financial statement, bill, contract, advertisement or other document involved in an allegedly "fraudulent" transaction were sent through the mails. As Justice Marshall, writing for four Justices of the Supreme Court in the Sedima case, recognized, "the effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering," 53 U.S.L.W. at 5040, because of the breadth of those statutory provisions.

C. "Enterprise" Requirement

RICO also requires that the person commit the predicate acts in a particular relationship to an "enterprise." Under the statute, it is unlawful to obtain any interest in an "enterprise" through a pattern of racketeering activity, to control an enterprise through such activity, or to conduct the affairs of an enterprise through racketeering activity. 18 U.S.C. § 1962. Depending on the facts, a plaintiff can easily satisfy the "enterprise" requirement in actions against legitimate businesses or businessmen by alleging that, for example, the defendant corporation or professional partnership is the "enterprise" that is conducting its affairs improperly.

III. THE LEGISLATIVE DEVELOPMENT OF CIVIL "RICO" SHOWS A PURPOSE TO PROTECT LEGITIMATE BUSINESSES

The bill that became the 1970 Organized Crime Control Act, including the RICO title, originated in the Senate. The Senate report stated unambiguously the objective of the legislation:

> "[T]he eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." S. Rep. No. 617, 91st Cong., 1st Sess. 2 (1969) (emphasis added).

In this vein, Senator McClellan, the bill's chief sponsor and a longtime foe of organized crime, focused his arguments for the bill on the insidious activities of "La Cosa Nostra." 116 Cong. Rec. 585-86 (1970). In particular, his sponsorship reflected awareness that, when "organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses." 115 Cong. Rec. 5874 (1969). The Senate wanted to provide a mechanism to respond to reports that "organized crime has begun to penetrate" some legitimate businesses, such as securities firms from which it was stealing securities. See S. Rep. No. 617, supra, at 77; 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan).

The House shared this concern about the infiltration of organized crime into businesses across the nation. Thus, when Congressman Poff, a leading proponent of the legislation, pointed to the takeover of a jukebox business by "a mafia boss," he illustrated the general understanding that RICO was meant to protect legitimate business people injured by organized crime. 116 Cong. Rec. 6709 (1970).

The Senate RICO bill had contained no provision for private civil suits when Senator McClellan introduced it, when the Judiciary Committee added the fraud predicates, or when the Senate initially passed the bill. A private civil remedy finally was added to the RICO legislation in the House Judiciary Committee at the urging of Representative Steiger, who submitted the draft of the language that ultimately became law. In submitting the amendment, Representative Steiger explained that his proposal was designed to add a private remedy to help in the fight "to deal with organized crime." Organized Crime Control: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States, 91st Cong., 2d Sess. 519 (1970). He carefully emphasized his understanding that RICO was designed "to prevent and reverse the corrupt infiltration of legitimate commercial activities by ruthless organized criminals." Id. So as to leave no room to doubt that he expected that the new statute, including his civil damage remedy, would be directed against "ruthless, organized criminals," Representative Steiger described examples of penetration of legitimate businesses by various "families" of "La Cosa Nostra" -- the Mafia. Id. In the sparse debate on the civil damage provision when the bill reached the House floor, the Chairman of the House Judiciary Committee, Representative Celler, explained that the addition of a treble-damage remedy was to be one of the tools "designed to inhibit the infiltration of legitimate business by organized crime." 116 Cong. Rec. 35,196 (1970).

The bill returned to the Senate shortly before adjournment, and the Senate accepted the amended version without seeking a conference. In doing so, however, no one suggested that the focus of congressional concern --

protection of legitimate businessmen -- had shifted in the slightest. Indeed, Senator McClellan described the House amendments, including the addition of the civil provision, as "comparatively . . . minor changes." 116 Cong. Rec. 36,293 (1970). At no time did any supporter of the bill suggest that the private civil remedy was intended for use against legitimate business people, corporations, or partnerships of licensed professionals, or was to be used in commercial disputes having nothing whatever to do with the activities that were and are commonly recognized as "organized crime."

IV. THE USE OF THE PRIVATE CIVIL DAMAGE PROVISION HAS ACTUALLY UNDERMINED THE CONGRESSIONAL OBJECTIVE

In light of the unambiguous congressional focus, civil RICO actions should closely parallel criminal prosecutions. Instead, civil RICO is used almost exclusively in commercial disputes, against what Assistant Attorney General Stephen S. Trott, in testifying on RICO before this Committee on May 20, 1985, called "conduct bearing little resemblence to organized crime activity in the traditional sense." The statute is now being invoked in every kind of litigation where a litigant can possibly allege the predicate offense of "fraud". Virtually all of these claims are either covered by specific federal regulatory laws such as the securities laws or do not belong in the federal courts at all. In the vast majority of cases, civil RICO claims are being used as weapons against the very people Congress was seeking to protect: legitimate business people. Not only have these developments distorted congressional expectations, but they also present widely recognized and increasing opportunities for abuse.

A. The Ability Of A Private Lawyer To Charge A Person With Criminal "Racketeering" Is Easily Abused

RICO is unprecedented in authorizing private lawyers who are representing purely private clients to invoke the judicial process by charging another private person with crimes. Under RICO, the private lawyer exercises power that normally is reserved to public officials and grand jurors: the power to lodge a formal accusation of crime. Those public officials and grand jurors, of course, have a duty of fairness and restraint in deciding whether to make that kind of accusation. As the Supreme Court once described the special responsibilities of prosecutors:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935).

A private lawyer, by contrast, owes allegiance to his client's private interest, not to a higher sense of justice. His interest is not in impartiality, but in partisan advocacy. He is his client's servant, not the servant of the law. His client's interest is not that "justice" be done, but that he obtain money from the defendant.

Because of these fundamental differences, our system surrounds the exercise of prosecutorial power with many legal and ethical restrictions not applicable to the private attorney. The officials who exercise prosecutorial discretion are accountable to the public for their judgments. As a further shield against overzealousness, the Constitution interposes grand jurors who, like the prosecutor himself, are sworn to secrecy while the prosecutor is attempting to demonstrate that there is substantial evidence to justify a proposed criminal charge. None of these restrictions, however, applies to a private lawyer who is considering filing a civil lawsuit in order to promote his client's financial interests.

The private claimant's power to brand a businessman or firm a "racketeer" may cause almost as much irreversible injury to the legitimate businessman as may an unwarranted criminal charge. Business rivals may use this power to gain economic advantage without actually having to go beyond the threat to file a civil RICO suit. The people who are monitoring the actual use of civil RICO know that this is the reality, not mere speculation. As Justice Marshall noted in the Sedima decision: "[T]he defendant, facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer,' will have a strong interest in settling the dispute."

53 U.S.L.W. at 5041. Ironically, therefore, civil RICO creates an opportunity for civil claimants to engage in a form of extortion, even though the criminal features of the statute are geared to prevent similar exactions by organized crime figures.

Several recent RICO cases illustrate the full range of the distortion to which the present language of the civil RICO provision lends itself and the difficulties the courts are having in applying the statute sensibly. In at least two instances RICO has been invoked in religious squabbles, and the trial judges have struggled to make RICO inapplicable. In Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125 (D. Mass. 1982), the district court was faced with a claim brought by a disaffected former adherent of the Scientologists alleging fraudulent misrepresentations. The RICO claim in Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983), turned on a dispute about the proper succession to the "Skolyer Rebbe," a Chassidic Jewish leadership position. The plaintiffs invoked "mail fraud" and other predicate offenses based on alleged misrepresentations by the defendants about their right to administer the congregation.[1]

The bizarre uses to which RICO may be put are not limited to religious disputes. RICO is being used as well in disputes between spouses and over inheritance. See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law ("ABA RICO Task Force Report") 39 n.41 (1985). In another recent case, a RICO suit was filed against former Vice President Walter Mondale, the Democratic National Committee and several individual members of the DNC, alleging that the defendants offered political contributions to other Democratic candidates in exchange for promises not to oppose Reagan Administration policies. While the court dismissed the claim, it did so solely on the ground that the plaintiffs had failed to allege acts that fell within the predicate acts specified in the statute. Taylor v. Mondale, Civ. No. 84-3149 (D.D.C. May 7, 1985), reported in Civil RICO Report (BNA), June 5, 1985, at 6. Thus, the court found nothing wrong with the basic use of RICO, only with the choice of the particular criminal acts pleaded as predicate offenses. In addition, at least one federal court has held that the fraud predicates supported a civil RICO claim for damages against FBI agents who orchestrated an undercover "sting" operation. Lightner v. Tremont Auto Auction, No. 82C 20090 (N.D. Ill. June 29, 1984), reported in 1 RICO Litigation Reporter 317 (September 1984). It is hard to imagine a more glaring illustration of the point that civil RICO is now being used against the very people it was designed to aid.

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[1] The district court dismissed the suit on the ground that the religious issues were non-justiciable. 566 F. Supp. at 558.

B. Civil RICO Suits Are Directed Mostly At Well Established Businesses, Not Organized Crime

The American Bar Association's special RICO Task Force recently collected comprehensive data about hundreds of private civil RICO cases, almost all of which have been reported since 1982.[2] The Report classified the essential allegations underlying the RICO charges as follows:

Percentage	Underlying Allegation
40%	securities fraud
37%	common law fraud in a commercial setting
4%	antitrust or unfair competition
4%	bribery or commercial bribery
3%	other fraud
2%	labor disputes
1%	theft or conversion
9%	offenses associated with professional criminal activity[3]

Another private survey located 132 civil RICO cases in which opinions have been published. According to the descriptions of allegations contained in those cases, they fall into the following categories:

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[2] ABA RICO Task Force Report at 53, 55 (of the cases collected in the Report's database, 3% were decided prior to 1980, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984).

[3] *Id.* at 55-56.

Securities transactions	57
Commercial and contract disputes	38
Commodities trading	6
Bank loans	6
Antitrust price fixing	3
Religious disputes	2
Divorce	1
Union affairs	3
Commercial bribery/kickbacks	2
Political corruption (including official extortion and bribery)	9
Theft (by cleaners from apartment dwellers)	1
Violent crimes (murder, arson, extortion)	3

Thus, cases that could fairly be characterized as having anything to do with aiding the war on organized crime are a tiny minority.[4]

In his recent testimony before the Senate Judiciary Committee on the need for civil RICO reform, Assistant Attorney General Trott of the Department of Justice reported that the Department's own survey of private RICO cases confirmed this pattern of massive abuse. He estimated that, as a result of the increasing use of civil RICO in commercial disputes, the actual number of private cases filed already exceeds 500. According to the Justice Department's calculations, only about 7% of these cases involve either actual organized crime figures or the kinds of criminal conduct common to organized crime syndicates. As Assistant Attorney General Trott concluded:

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[4] Both the majority and minority opinions in the Sedima accepted and cited these statistics. 53 U.S.L.W. at 5039 n.16, 5041. Both recognized that this result was not what Congress intended; they diverged only on the question whether the courts may properly do anything to prevent future use of the statute in this manner. The majority concluded that this is a task for Congress, not the courts. See pp. 31-35, infra.

> "Experience has shown . . . that the instances of private civil RICO's use against traditional organized crime activities are far outweighed by example of its application as a general federal anti-fraud remedy against seemingly reputable businessmen."

On some occasions, private plaintiffs have used civil RICO to pursue people who had first been prosecuted and convicted of the predicate acts or RICO itself. The three civil RICO cases noted in the private survey of 132 cases which involved allegations of gangster-like conduct -- murder, arson and extortion -- were cases filed after the authorities had obtained criminal convictions. See Anderson v. Janovich, 543 F. Supp. 1124 (W.D. Wash. 1982) (tavern owner claimed that convicted competitors tried to control local tavern business through threats of murder and arson); State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982) (insurance company sought to recover fraudulently obtained proceeds after convictions in arson-for-hire case); City of Milwaukee v. Hansen, No. 77-C-246 (E.D. Wis. January 13, 1981) (city sought to recover costs incurred in fighting fires started by convicted arsonists). In addition, about a dozen other civil RICO cases have followed criminal convictions, generally for some form of political corruption. In one recent case, the Seventh Circuit upheld a RICO judgment against a defendant sued after he had pleaded guilty to charges of mail fraud based on the same conduct. See McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985). In another recently filed action, a corporation brought RICO claims against, inter alia, two individuals who had recently pleaded guilty to federal securities law violations. Anheuser-Busch Companies, Inc. v. Thayer, No. 3-85-0794-R (N.D. Tex.; complaint filed April 26, 1985), reported in Racketeer Litigation Reporter at 695 (May 1985). RICO thus can be, and has been, used to pursue civil remedies against convicted felons.

In most civil RICO cases, however, the public authorities have not found a basis to proceed with any criminal charges. There has been, therefore, no careful screening by publicly accountable officials before private claimants have charged those defendants with criminal "racketeering." This is not surprising, because public officials would not have considered it fair or accurate to brand the defendants in these cases "racketeers." Indeed, one commentator, who maintains the computerized database of civil RICO decisions upon which the ABA RICO Task Force relied and who served as Executive Director of that Task Force, concluded that, "realistically speaking, the likelihood of state or federal prosecutors seeking indictments in the vast majority of these types of cases is as close to zero as anything could be." Weissman, "Circuit Aims To Curb Private Civil RICO Actions," Legal Times, August 20, 1984, at 12. Thus, these civil cases are not supplementing the enforcement efforts of prosecutors who simply lack the resources to deal with all the offenses deserving prosecution. Instead, these cases involve, with rare exceptions, disputes that no responsible prosecutor would brand as criminal, much less as the manifestations of "organized crime" or "racketeering."

Although the burden of RICO's misuse does not fall solely on persons in the financial community and in related professional services, the burden has become especially severe for these people because they are viewed as vulnerable "deep pockets" whenever an investment or a commercial transaction goes sour. As The New York Times reported, despite the expectation that civil RICO would focus on "mobster deals," "legitimate businesses" such as Morgan Stanley, American Express, and Lloyd's of London have "found their names smeared with racketeering charges. . . ." N.Y. Times, September 4, 1984, at D2.[5/] A partial roster of defendants in civil RICO suits includes the following established and respected entities that private claimants have charged with a "pattern of racketeering":

[5/] In light of civil RICO's unintended use as a weapon against "ordinary enterprises," The New York Times recently called for a legislative "repair job" on RICO's civil treble-damage provisions. "Where To Fix The Rackets Law," N.Y. Times, July 8, 1985, at A16.

Investment bankers and brokers

Bache Halsey Stuart Shields, Inc.
Bear Sterns & Co.
Dean Witter Reynolds
Lehman Brothers Kuhn Loeb, Inc.
Loeb Rhodes & Co., Inc.
Merrill Lynch, Pierce Fenner & Smith, Inc.
Morgan Stanley & Co., Inc.
Oppenheimer & Co.
Paine Webber Jackson & Curtis, Inc.
Shearson/American Express, Inc.
Thomson McKinnon Securities, Inc.

National C.P.A. Firms

Alexander Grant & Company
Arthur Andersen & Co.
Coopers & Lybrand
Ernst & Whinney
Laventhol & Horwath
Peat Marwick Mitchell & Co.
Price Waterhouse
Touche Ross & Co.

Law Firms

Lord, Bissel & Brook
Pierson, Ball & Dowd
Singer, Hutner, Levine & Seemans
Sullivan & Worchester

Banks

Citibank, N.A.
Continental Illinois National Bank & Trust Co.
Crocker National Bank
First American Bankshares, Inc.
First Interstate Bank of Oregon
First National Bank of Atlanta
First National Bank of Maryland
Marine National Bank (Wisconsin)
National Republic Bank of Chicago
Pacific Western Bank
Riggs National Bank of Washington, D.C.
Sierra Federal Savings & Loan Association
Southwest National Bank
State Bank of India
Union Bank

Insurance Companies

Allstate Insurance Co.
Lincoln Insurance Co.
Prudential Insurance Co. of America
State Farm Mutual Automobile Insurance Co.
Travelers Insurance Co.
Underwriters of Lloyd's, London
USLIFE Corp.

Manufacturing Companies

A.H. Robins Co., Inc.
Boeing Co.
Continental Group, Inc.
General Motors Corp.
Miller Brewing Co.
Mitsui & Co. (U.S.A.), Inc.
Rockwell International Corp.
Rohm & Haas Co.

Firms like those have been named as defendents in dozens of civil RICO suits, even though the Justice Department has not seen merit enough even to file criminal charges against them, much less to obtain convictions. Of course, the enormous expenses associated with defending against unchecked civil RICO claims become a cost of doing business that ultimately taxes the consumers of the goods and services provided by these firms and by their customers and clients.

C. Civil RICO Is Used Most Extensively In Ordinary Commercial Disputes

As the figures demonstrate, the vast bulk of private civil RICO cases have come in commercial contexts -- hardly in the settings that Congress thought needed bold new weapons or special incentives to sue. All its sponsors expressly agreed that RICO was aimed at preventing the infiltration of legitimate business by organized crime.

The draftsmen certainly did not intend, for example, to have RICO become a device for challenging corporate takeover bids or to add a new level of regulation of those hotly contested deals. Yet, as SEC member Charles Marinaccio told this Committee in May of this year, "[i]t has become standard practice to add a RICO charge to lawsuits challenging tender offers." Statement of Charles L. Marinaccio, Member of the Securities and Exchange Commission, Before the Committee on the Judiciary, United States Senate, May 20, 1985, at 3; see, e.g., Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Gearhart Industries, Inc. v. Smith International, Inc., 592 F. Supp. 203 (N.D. Tex.), modified, 741 F.2d 707 (5th Cir. 1984). In Dan River, Inc. v. Icahn, supra, the court of appeals expressed concern about attempts to use RICO to block a takeover bid through a public tender offer, pointing out that this is simply one illustration of the unintended and excessive use of civil RICO:

> "Finally, we note the mounting controversy in the federal courts over the proper limits, if any, upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. Congress was out to attack the problem of organized crime, not the problem of corporate control and risk arbitrage. We of course make no attempt to resolve the dispute here and now. We do not propose to enter the fray. We only note that the reach of RICO is itself a troubling issue . . . ." 701 F.2d at 291.

See also Tyson & August, The Williams Act After RICO: Has The Balance Tipped In Favor Of Incumbent Management?, 35 Hastings L.J. 53, 111-12 (1983) ("By giving target management a powerful new weapon in the takeover battle, the judicial approval of RICO suits predicated on Williams Act violations undermines the careful policy of evenhandedness that the Williams Act Congress sought so hard to attain").

The treble-damage weapon of RICO and the "racketeering" label are also being used to challenge the ways banks set up their loan procedures and terms. For instance, in Morosani v. First National Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983), the Eleventh Circuit has allowed a case to proceed on the claim that the "prime rate" used in computing the interest on the plaintiff's loan was not the bank's true prime rate. The Supreme Court recently agreed that RICO sweeps so broadly as to encompass such a case. See Haroco v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd, ___ U.S. ___, 53 U.S.L.W. 5067 (July 1, 1985) (per curiam). In Lode v. Leonardo, 557 F. Supp. 675 (N.D. Ill. 1982), the court explained why it, too, felt obliged to entertain a RICO suit involving alleged misrepresentations relating to a commerical loan:

> "Congress may not have envisioned that the civil remedies it supplied in RICO would find the widespread use that they have in commercial fraud cases. And such use of RICO's remedies may well be somewhat undesirable. But, when a plaintiff makes allegations which appear to state a claim under the statute as it is written, it is not the function of this Court to reject that claim on the ground that Congress must have meant something other than what it said in the statute." 557 F. Supp. at 681.

RICO counts have already appeared in many other cases involving disputed commercial transactions, including churning of stock,[6] representations about a broker's expertise,[7] projections used in real estate syndication,[8] disputes between landlord and tenant,[9] disallowance of insurance claims,[10] alleged overcharges by a printer,[11] and failure to publish a medical journal according to a contractual agreement.[12] Because Congress included open-ended "fraud" predicates, there is ample room for transforming even more kinds of commercial disputes into RICO cases.

Although the "fraud" predicates are the easiest to abuse by artful pleading, they are not alone. In a recent decision, the Fourth Circuit ordered reinstatement of a civil RICO case brought by a condominium developer who alleged that the purchasers of an office condominium unit were trying to "extort" an unreasonably high price from him in connection with the developer's effort to repurchase the condo unit in order to include it in a block of units the developer wanted to sell to IBM. Although the district court found that this was "at best a garden-variety commercial breach of contract" case, the Fourth Circuit concluded that the allegations might make out a claim of "extortion" under state law and, therefore, the plaintiff could press the case under RICO. Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984). The two businessmen who originally bought the condominium unit -- and their wives as co-defendants -- now stand accused of being racketeers and must defend themselves against a statute that Congress believed would protect business people from, in Representative Steiger's words, "ruthless organized criminals."

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[6] See, e.g., Harper v. New Japan Securities International, Inc., 545 F. Supp. 1002 (C.D. Cal 1982).

[7] See, e.g., Noland v. Gurley, 566 F. Supp. 210 (D. Colo. 1983).

[8] Gordon v. Terry, 684 F.2d 736 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

[9] Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983).

[10] Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983).

[11] Estee Lauder, Inc. v. Harco Graphics, Inc., 558 F. Supp. 83 (S.D.N.Y. 1983).

[12] American Society of Contemporary Medicine, Surgery & Opthalmology v. Murray Communications, Inc., 547 F. Supp. 462 (N.D. Ill. 1982).

D. The Inclusion Of Fraud-Based Predicate Offenses Is The Source Of Most Of The Abuse Of Civil RICO

Without doubt, the single most important aspect of RICO that permits plaintiffs to transform commerical disputes into federal treble-damage actions is the inclusion of "mail fraud," "wire fraud," and "fraud in the sale of securities" in the list of predicate offenses. The comprehensive survey by the ABA Special Task Force on Civil RICO ascertained that 91% of RICO claims appear in cases that involve sales of securities or commodities or relate to contract disputes or other ordinary commercial transactions. See ABA RICO Task Force Report at 55-56. Although Congress added the fraud-based predicates at a time when RICO did not provide for a private remedy, and it added the private remedy at the last minute without careful consideration of how it would be used, the result, to quote the words of Justice Marshall in Sedima, "quite simply revolutionizes private litigation." 53 U.S.L.W. at 5040. Justice Marshall went on: "The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations." Id. He similarly recognized that the fraud-based predicates allow a plaintiff to bypass the federal securities laws in favor of a claim under RICO. Id. at 5041. The result, Justice Marshall and these other Justices realized, is "the federalization of broad areas of state common law of frauds, and . . . the displacement of well-established federal remedial provisions." Id. at 5040.

Claims based on "mail fraud" and "wire fraud" predicate offenses are easy to plead in many commercial disputes. They are also likely to survive motions to dismiss made at early stages. This is so because the underlying law in this area has been developed in criminal prosecutions under broadly worded criminal statutes. Courts have been willing to allow public officials to use broad prosecutorial discretion in determining which transactions are properly prosecutable:

> "The crime of mail fraud is [broad] in scope. The fraudulent aspect of the scheme to 'defraud' is measured by a non-technical standard. Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing

> in the general and business life of members of society.' This is indeed broad." Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (citations omitted).

In almost any instance where a venture has lost money, or a stock has fallen in value, a disappointed investor can allege that the businessman's behavior was not a "reflection of moral uprightness" and "fair play." As Justice Marshall noted in his opinion in Sedima:

> "The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years Courts of Appeals have 'tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.'" 53 U.S.L.W. at 5040, quoting United States v. Weiss, 752 F.2d 777, 791 (2d Cir. 1985) (Newman J., dissenting).

Justice Marshall recognized that "[t]he only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes,' United States v. Siegal, 717 F.2d, at 24 (Winter, J., dissenting in part), has been the prudent use of prosecutorial discretion." 53 U.S.L.W. at 5040. The courts have permitted the expansive reading of the mail and wire fraud statute knowing full well that no private right of action existed under those criminal statutes. Id. Although Congress has never directly authorized private civil suits under the mail or wire fraud statutes, the inclusion of those offenses among the predicates for a civil suit under RICO now has given this vast discretion to private claimants through the back door.

The result, as Justice Marshall wrote, is an enormous expansion in federal jurisdiction over ordinary civil disputes:

> "In the context of civil RICO . . . the restraining influence of prosecutors is completely absent. . . . [S]uch litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. . . . The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the states." Id. at 5041.

As one former federal prosecutor recently wrote in calling for legislation to delete "the mail fraud and wire fraud statutes from the list of predicate acts required to bring a private civil RICO action:"

> "[A] general problem with RICO, that the constraints of prosecutorial discretion and guidelines which limit its application in the criminal sphere are no bar to its private civil application . . ., is most acute when the underlying predicate statutes are mail fraud and wire fraud, since it is the breadth of these statutes, both actual and potential, that forms the basis for most of the recent expansion of civil RICO litigation." Rakoff, "Opinion," 1 RICO Litigation Reporter 206-07, 211 (September 1984).

Nothing in the legislative history of RICO suggests Congress intended to federalize local commercial disputes. Continued inclusion of "mail fraud" and "wire fraud" as predicates for civil RICO claims, however, allows private plaintiffs to disregard these concerns about federalism and to transform local disputes into federal cases simply because one of the parties used the mail or the telephone.

Similarly, private plaintiffs find it easy to level allegations of "securities fraud." Since the federal courts are reluctant to dismiss complaints before a plaintiff has had a chance to pursue substantial discovery in a search of evidence to support his allegations of "fraud," these cases withstand initial challenges. Even if the predicate offense that a plaintiff must ultimately prove in a civil RICO case is criminal securities fraud, a plaintiff may not even have to allege -- much less prove -- a deliberate intent to defraud him. For example, in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976), the court upheld the conviction of a partner in a major accounting firm. On the basis of a finding that he had "recklessly" conducted a corporate audit, he was convicted of assisting in the corporation's filing of a false proxy statement in violation of 15 U.S.C. § 78ff(a). The trial judge, in sentencing the accountant, indicated that no finding of actual knowledge of falsity was necessary for conviction:

> "I think you are absolutely sincere when you say that you do not believe that you did anything wrong in this audit or audits. . . . But the tragedy is that the jury found that this was an audit or audits done with reckless disregard for what was really involved." United States v. Natelli, 74 Cr. 43 (S.D.N.Y.), Transcript of Sentencing at 12.

Thus, a plaintiff may be able to assert a viable RICO claim based on alleged "fraud in the sale of securities" simply by claiming that the defendants were reckless in their actions, and that, as a result, a "fraudulent" filing or similar securities law violation occurred.

Moreover, the result of converting securities fraud claims into RICO claims is to displace the carefully structured remedies of the federal securities laws. First, civil RICO has unwittingly created a treble-damage remedy for ordinary securities law violations even though "the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees." _Sedima_, 53 U.S.L.W. at 5041 (Marshall, J., dissenting). Second, under RICO the plaintiff can raise the non-monetary stakes as well, because now the defendant runs the risk of being branded a "racketeer." As Justices Marshall, Brennan, Blackmun, and Powell recognized, the result of this double-barrel risk is not justice, but capitulation:

> "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." _Id_.

Third, and perhaps most important, this use of civil RICO "virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws." _Id_. This end-run around the requirements of the securities laws is possible because a RICO plaintiff can simply allege a RICO violation based on mail or wire fraud predicate acts, rather than "securities fraud," growing out of a securities transaction. Thus, despite that fact that "[o]ver the years, courts have paid close attention to matters such as standing, culpability, causation, reliance and materiality, as well as the definitions of 'securities' and 'fraud,'" _id_., the broad swath that the civil RICO's fraud provisions cut through established legal principles makes all of this carefully fashioned law "now an endangered species . . . ." Id.

The Senate added securities fraud, as well as wire and mail fraud, to the bill's list of predicates at the suggestion of the SEC's Division of Enforcement because organized crime figures had begun to engage in market manipulation and securities theft. The SEC officials recommended the changes when they understood that the legislation would provide only for government, not private, remedies. They believed that RICO could serve as an important weapon for government enforcement against those activities. See ABA Civil RICO Task Report at 99-100 n.130. When the House added the private civil remedy, no one suggested that the securities fraud predicate was intended to displace the specific statutory scheme long in place.

Moreover, when Congress decided to add securities fraud as a RICO predicate, it referred to only one significant kind of misconduct that was not already covered by the federal securities laws but was attracting organized crime: trafficking in stolen or counterfeit securities. Experience has shown, however, that civil RICO is not being used against schemes of that type. By including the securities fraud predicates, RICO instead allows private claimants to duplicate -- but for treble damages -- the rights already granted by the federal securities laws or allows them to circumvent the limitations that Congress has deliberately fashioned for civil suits under those laws. In neither type of situation is there any justification for tolerating the costly mischief that civil RICO permits.

E. The Supreme Court Has Held That Congress, Not the Courts, Must Correct Civil RICO'S Overbreadth

Up until recently, several trial judges and one federal circuit attempted to restrain the use of civil RICO in ordinary commercial disputes. Some tried to treat the statute as requiring an allegation of some actual connection with "organized crime." E.g., American Savings Ass'n v. Sierra Federal Savings & Loan Ass'n, 586 F. Supp. 888 (D. Colo. 1984). Others tried to require a showing of some special "racketeering injuries." E.g., Harper v. New Japan Securities International Inc., 545 F. Supp. 1002 (C.D. Cal. 1982). These efforts generally met with hostility in most appellate courts. See, e.g., Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 104 S. Ct. 1280 (1984) (rejecting requirement of link to "organized crime"); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (same); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984) (same); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), cert. denied, 104 S. Ct. 508, 509 (1983) (rejecting special injury requirement); Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408, 413 (8th Cir. 1984) (same).

This past term, the Supreme Court dashed whatever faint hope had existed that judicial construction of the statute could tame runaway civil RICO. In a 5-4 vote, the Court overturned a decision of the Second Circuit in which the court of appeals had held that a civil RICO claim could only be brought against a defendant who had been convicted of the predicate acts underlying the RICO claim or of RICO itself and could only be brought to collect damages for a separate "racketeering injury," wholly distinct from injury arising from the predicate acts themselves. Sedima, supra. At the same time, the Court affirmed a Seventh Circuit decision in which the lower court had rejected the requirement of a separate injury. American National Bank v. Haroco, Inc., ___ U.S. ___, 53 U.S.L.W. 5067 (July 1, 1985) (per curiam). In deciding these cases, the Court made it crystal clear that any correction in the course civil RICO has taken must come from Congress, not the courts.

The Court was unanimous in recognizing that civil RICO had strayed far from the object that Congress had in mind when it wrote and passed the Act. The majority opinion in Sedima acknowledged that it understood the "concern over the consequences of an unbridled reading of the statute," and the Second Circuit's perception of "misuse of civil RICO." 53 U.S.L.W. at 5034. The majority opinion also recognized that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors," id. at 5039, and that "private civil actions under the statute are being brought almost solely against" what the Court called "respected and legitimate enterprises," rather than against "the archetypal, intimidating mobster." Id. And the majority cited with approval the statistics from the ABA Task Force Report, see pp. 14-15, supra, that bear out that conclusion. 53 U.S.L.W. at 5039 n.16.

As the quotations throughout this Appendix suggest, Justice Marshall, writing in dissent for four members of the Court, was even more explicit in detailing the ways in which civil RICO claims have caused disruptions far beyond anything intended by Congress, but the majority did not disagree with the dissenters' descriptions. Justice Marshall detailed the ways that "in both theory and practice, civil RICO has brought profound changes to our legal landscape," id. at 5041, and he recognized that "nothing in the language of the statute or the legislative history suggests that Congress intended either the federalization of state common law or the displacement of existing federal remedy." Id. Justice Marshall's opinion summarized the problematic results of civil RICO:

> "These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect." Id. at 5045.

Justice Marshall as a general matter is neither a strident supporter of states' rights nor an advocate of business interests against the injured individual; yet he concluded in no uncertain terms that civil RICO has unintentionally altered the balance between federal and state law in a profound manner and has made legitimate businesses a target of "uncalled-for punitive bills and undeserved labels." Id. at 5045.

Justice Powell, who joined in Justice Marshall's opinion, also wrote separately, reiterating the manner in which civil RICO has come to be used "against legitimate businesses seeking treble damages in ordinary fraud and contract cases," and concluding that "it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result." Id. at 5047.

The majority and minority parted company only over the question of whether the courts could play any role in narrowing civil RICO's reach. The minority believed that the language of the statute could plausibly be interpreted narrowly in certain respects. The majority, applying its philosophical belief that the courts should not rewrite statutes, accepted the premise that the statute is being used in unintended ways but rejected the notion that the Court could play any role in solving that dilemma. The majority placed responsibility for solving the problem upon the representative body that passed the statute in the first place: "[T]his defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress." Id. at 5039 (emphasis added).

F. Civil RICO Claims Against Legitimate Businesses Are Burgeoning

It is likely that, in the face of the Supreme Court's rejection of the major judicial attempts to construe civil RICO narrowly and its deferral to Congress to correct the overbreadth, RICO suits simply alleging securities fraud, commercial fraud, or other "imaginative" claims will continue to grow. The situation is already out of hand and likely to get worse.

Relatively few private RICO cases have progressed all the way to judgment, because intensive use of the statute in civil cases only began to blosso n a few years ago. The ABA RICO Task Force Report found that, although the statute was enacted in 1970, there was only one reported opinion in a civil RICO case as of 1972, only on other case reported prior to 1975, and only nine reported decisions prior to 1980. ABA RICO Task Force Report at 55. Sinc then, the numbers have grown exponentially. Id. See also p. 14 n.2, supra. The invocation of RICO against legitima e businesses in kinds of disputes never contemplated by Cong ess when it passed RICO is almost certain to accelerate in the wake of the recent Supreme Court decisions, since the Court ha eliminated almost any chance that previously existed that a defendant could defeat a RICO claim at the threshold of litigation. Reflecting this impact, the Washington Post headlin d its article on the Sedima decision: "RULING SEEN INCREASING OUT-OF-COURT SETTLEMENTS: More Costly Litigation Also Predicted." Abramowitz, Washington Post, July 2 1985, at E10.

In addition, there is rapidly spreading publicity about the utility of RICO as a device for getting a local commercial dispute into federal court or as a tactic for dramatically increasing the stakes in a case otherwise covered by the traditional single-damage remedy of other, specific federal laws, such as the securities laws. The Washington Post story on Sedima quoted a leading plaintiff's attorney who predicted that civil RICO would be used increasingly in the future to "federalize" product liability litigation. Id. The same day, the Wall Street Journal also commented that civil RICO suits, "few of which involve organized crime, are proliferating because they can be quite lucrative." Wermeil, "Supreme Court Refuses to Curb Racketeer Law," Wall Street Journal, July 2, 1985, at 2. The article summarized the lure: "Plaintiffs favor RICO because of the chance to triple damages and win attorneys' fees and legal costs, and because it poses fewer procedural hurdles than federal securities law or state contract law." Id. As another article discussing the wider use of civil RICO expected in the wake of the Supreme Court's decision put it in its headline: "'Sedima': The Civil RICO's Juggernaut Steams On." Mathews and Weissman, Legal Times (ABA Daily Ed.), July 9, 1985, at 10.

Legal and business journals are filled with articles discussing the statute. *See*, *e.g.*, Blakey, "*RICO* Is Working," *The Brief* (the magazine published by the Tort and Insurance Practice Section of the American Bar Association), Summer 1985, at 18; Quinn and Bograd, "*RICO* Is Backfiring," *id*. at 19; Pickholz, "The Firestorm Over Civil RICO," 71 *ABA Journal* 79 (1985); Skinner and Tone, "Recent Developments in RICO Litigation," *National Law Journal*, February 13, 1984, at 20; Skinner and Tone, "Civil RICO and the Corporate Defendant," *National Law Journal*, January 30, 1984, at 22; Flaherty, "Private RICO Damages Awarded," *National Law Journal*, December 26, 1983, at 8; Sylvester, "Civil RICO's New Punch," *National Law Journal*, February 7, 1983, at 1; Weissmann, "'Moss' Makes RICO Statute the Darling of Plaintiffs' Bar," *Legal Times*, December 19, 1983, at 24; Murphy, "RICO -- A Federal Treble Damage Fraud Statute?", *New York State Bar Journal*, July 1983, at 18; "Business is Picking Up An Anticrime Weapon," *Business Week*, February 20, 1984, at 85.

So too, law reviews are focusing a great deal of attention on the statute, debating the extent of its flaws and the proper methods of correcting them. *See*, *e.g.*, *Civil RICO Symposium*, 21 Cal. W. L. Rev. No. 2 (1985); Comment, *Sedima v. Imrex: Civil Immunity for Unprosecuted RICO Violations?*, 85 Colum. L. Rev. 419 (1985); Note, *Civil RICO: A Call For A Uniform Statute of Limitations*, 13 Fordham Urban L.J. 205 (1984); Sackheim, Leto & Friedman, *Commodities Litigation: The Impact of RICO*, 34 DePaul L. Rev. 23 (1984);

Tyson & August, The Williams Act After RICO: Has The Balance Tipped In Favor Of Incumbent Management, 35 Hastings L.J. 53 (1983); Note, RICO and Securities Fraud: A Workable Limitation, 83 Colum. L. Rev. 1513 (1983); Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982); Campbell, Civil RICO Actions in Commercial Litigation, 36 Sw. L.J. 925 (1982). One recently published bibliography listed approximately 150 articles on civil RICO that have appeared in legal publications. See Milner, A Civil RICO Bibliography, 21 Cal. W.L. Rev. 409, 427-35 (1985).

Numerous how-to-do-it courses are being offered nationwide to acquaint lawyers with RICO's possibilities. For example, the ABA already has held four "continuing legal education" National Institutes on RICO, three in New York City in September 1983, February 1984 and October 1984, and one in Los Angeles in November 1983. With ominous accuracy the ABA titled the first three of these sessions "RICO: The Ultimate Weapon in Business and Commercial Litigation." The latest session, in New York, was entitled "RICO -- The Second Stage." Among the featured topics at the October 1984 meeting were discussions of RICO and its impact on states and municipalities, RICO suits by and against unions, and RICO suits against financial institutions. The popularity of the presentations is great; the mailing for the February 1984 course pointed out that the two earlier meetings were sold out, with over 600 lawyers in attendance. Moreover, one of the programs held at the ABA's August 1984 annual convention was entitled "RICO:

The Current Status of Baby Huey," and at its most recent convention just completed in July 1985, the ABA again had a major program on current developments in civil RICO.

The Practicing Law Institute ("PLI") also held RICO sessions in June of 1984 both in New York City and in San Francisco, with topics including the use of RICO in "antitrust cases," "commercial bribery and faithless employee cases," "unfair competition cases," "securities and commodities cases," and "corporate takeover cases." In addition, Law & Business, Inc., offered RICO programs in Chicago\in June and in San Francisco in July of last year and plans similar progams in New York, San Francisco, and Chicago in September, October, and November 1985, respectively.

The volume of RICO litigation is expected to be so heavy that a special reporting service called the "RICO Litigation Reporter" -- now renamed the "RICO Law Reporter" -- began regular publication in May 1984, and two additional reporting services devoted exclusively to this subject recently began publishing. The recent Supreme Court decisions, with the attendant publicity as well as the substantive message contained in those decisions that it is all right to use civil RICO broadly, will only increase the spotlight on civil RICO's potential uses as a weapon in commercial litigation.

\ The bonanza for lawyers in RICO cases is widely and candidly recognized. Indeed, when the Los Angeles Times did a series of articles last year on "the litigation explosion," it devoted a front page article just to private civil

RICO suits, entitling the feature, "'RICO' Running Amok in the Board Rooms," and subtitling the piece, "Law aimed at Mafia becomes popular in private suits." Siegel, *Los Angeles Times*, February 15, 1984. The article quoted one RICO lawyer as explaining that when he set up his private law practice he "was looking for a way to develop business," and he "studied RICO and saw the potential for lots of civil litigation." As the Supreme Court recognized, as long as the statute remains worded broadly, lawyers will have every incentive to continue pushing its use to the outer limits of the statutory language. As one author counseled:

> "[A] plaintiff's attorney zealously protecting the rights of his client, as he is charged to do, is obligated to bring RICO claims where they can reasonably be interposed." Brodsky, "RICO," *New York Law Journal*, February 15, 1984, at p. 1, Col. 1.

Of course, in addition to multiple damages, the plaintiffs in these actions seek attorney's fees. While there are few civil RICO cases that have progressed far enough to have reached the fee-determination stage, the amounts at issue are substantial.[13] Awards of hundreds of thousands or even millions of dollars are not uncommon under other statutes that contain similar "fee shifting" provisions. The prospect of such handsome awards is a powerful stimulus to press RICO to even newer frontiers.

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[13] For example, in *Schacht v. Brown*, *supra*, the lead counsel for the plaintiff Insurance Commissioner reported billings of $363,737.00 through September of 1982. "Insurance Liquidations a Legal Bonanza," *Chicago Tribune*, September 12, 1982, § 5 at 1. This may include expenses for some items in addition to the *Schacht* litigation itself, but the vast majority is almost certainly for that civil RICO action, in a period *before* any significant discovery had commenced.

V. REFORM OF CIVIL "RICO" SHOULD REINTRODUCE THE IMPORTANT OVERSIGHT BY FEDERAL AND STATE PUBLIC PROSECUTORS BY CREATING A PRIOR-CRIMINAL-CONVICTION REQUIREMENT

A. The Administration, The Courts, And Others Have Recognized The Need For Reform

The explosion of unjustified civil RICO cases is already at hand, and the adverse effects of this development on the courts and on legitimate business are direct, palpable, and unwarranted. It would be difficult to overstate the *in terrorem* effect of civil RICO on legitimate businesses, even though relatively few companies, so far, actually have been ordered to pay treble damages in these cases. As *Business Week* reported:

> "Lawyers say the number of court awards under RICO is not an accurate measure of the problem, because few cases go to trial: The mere threat of a headline suggesting a connection with organized crime often induces a settlement." February 20, 1984, at 85.

In addition, the scope of the permissible allegations permits wide-ranging pre-trial discovery: "That gets very, very expensive," one securities lawyer was quoted as explaining, "and the cost tends to result in settlements." *Id.* As Justice Marshall himself recognized, a "defendant, facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer,' will have a strong interest in settling the dispute," 53 U.S.L.W. at 5041, "even a case with no merit." *Id.*

In urging reform, the American Bar Association has stated:

> "When RICO is combined with mail fraud predicate offenses, the effect is to federalize all torts involving business transactions in which a party thinks deceitfully and uses the mails. This result is undesirable in two respects: (1) the efficient operation of federal courts will be significantly impaired, if not crippled, by a tidal wave of RICO civil actions when plaintiffs become aware of the attractions of treble damages and recovery of attorney's fees; and (2) the balance between state and federal power will be substantially disrupted. If future RICO statutes are to include civil remedies, use of mail fraud as a predicate offense must be limited." Reports with Recommendations to the House of Delegates, ABA, 1982 Annual Meeting, August 1982, Report No. 112C at 8, adopted by the House of Delegates August 1982.

According to the recent ABA RICO Task Force Report, fully 74% of all lawyers surveyed with actual experience with RICO claims, either as counsel for plaintiffs or for defendants, believe that the statute should be amended, and only 8% see no need for reform. ABA RICO Task Force Report at 62.

From his unique vantage point as a regulator of the securities industry and the accounting profession, SEC Commissioner Charles L. Marinaccio expressed his view that civil RICO has "gone awry in the execution," and is being used against "the very legitimate corporations and businesses that were intended to be protected" to undermine the "carefully crafted structures" of express and implied remedies under state and federal securities laws. See Statement of Charles L. Marinaccio, Member of the Securities and Exchange Commission, Before the Committee on The Judiciary, United States Senate, May 20, 1985, Exhibit 3. As the Commissioner told this Committee in testimony in May of this year, "I believe there is an urgent need to amend RICO by legislation to end the excessive uses to which the statute's private civil remedy has been put." Id. at 1. The Commissioner recounted the ways in which private civil RICO is "threatening to disrupt the balance of the [federal securities] regulatory scheme," id. at 6, and he concluded that "predicating the availability of a private remedy on prior criminal convictions offers the most reasonable way to mitigate problems in the securities fraud area." Id. at 8. The Chairman of the SEC, John S.R. Shad, has also expressed concern about the unintended impact of civil RICO on "the carefully crafted scheme of express and implied remedies for securities law violations which the Congress and the courts have fashioned over the past 50 years." Id. Exh. 2.

Federal judges, acting in their capacity as commentators on what they are witnessing, also have spoken out in public about the problem. Thus, District Judge Milton Pollack of New York has said:

> "[O]ne of the proliferating developments in civil litigation has been the use of RICO, the Racketeer Influenced and [Corrupt] Organizations Act, in civil claims, in routine commercial disputes, including those arising under the Federal Securities Laws. I think that the proliferation of those claims and the use of a law that was designed to eliminate organized crime is a very bad influence on the commercial community." "Symposium Highlighting Developments in Securities Law Over Past Century," New York Law Journal, January 30, 1984, at 52.

And Judge Abner Mikva of the United States Court of Appeals in the District of Columbia, who had warned against the overbreadth of the proposed RICO bill when he was in Congress in 1970, has seen RICO outstrip his worst fears. He warned then that placing a treble-damage remedy under so broadly worded a statute would provide an "invitation" to the "disgruntled and malicious" to "harass innocent businessmen . . . ." H. R. Rep. No. 1549, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4007, 4083. As he predicted, "What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish -- destruction of the rival's business." Id. Judge Mikva was quoted in an interview as expressing regret that these problems were not avoided by complete deletion of the civil provision, which "was not an important element of the legislation." Los Angeles Times, February 15, 1984.

In their formal opinions as well, many courts, as the Supreme Court did in Sedima, have warned about these dangers and abuses, even while deciding that they are obliged to apply the expansive language of the statute as originally written. For example, in allowing a mail fraud allegation to proceed as a RICO case, the Seventh Circuit in Schacht ruefully observed that Congress inadvertently "may well have created a runaway treble damage bonanza for the already excessively litigious." Schacht v. Brown, supra, 711 F.2d at 1361. In another Seventh Circuit case, the court observed that RICO "is constructed on the model of a treasure hunt," Sutliff, Inc. v. Donovan Cos., supra, 727 F.2d at 652, and went out of its way to comment:

> "We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about." Id. at 654.

The Administration has heard these calls for reform and has decided that they are well founded. The Vice President's Task Group on Regulation of Financial Services, whose members included the Attorney General, recognized in its final report adopted on July 2, 1984, that civil RICO is being abused. The Task Group found that:

> "[A] statute designed to control organized crime through both criminal and civil penalties against racketeering . . . has increasingly been utilized by imaginative lawyers in suits against banks, securities firms, accountants and other perfectly legitimate businesses without even any alleged connection to organized crime."

The Report continued:

> "This litigation increases the backlog in federal courts, undermines the structure of the substantive banking and securities laws enacted by Congress, and creates totally unnecessary costs for the affected firms and, ultimately, their customers."

Accordingly, one of the Task Group's recommendations (number 5.15) calls for "Elimination of Nuisance Litigation Under RICO." Without defining precisely how RICO should be amended, the Task Group states as the Administration's goal the formulation of amendments "to ensure that its civil liability provisions are not misused by private parties in litigation involving financial institutions."

Attorney General Meese expressed similar concerns during his nomination hearing before this very Committee. In response to a question from Senator Grassley about RICO, Mr. Meese stated:

> "I share with you your concern that what is essentially a form of action against criminal activity, even though with civil penalties and civil actions involved -- that this not be misused as a means of carrying on ordinary civil litigation where no organized crime is involved." Transcript of Proceedings (Jan. 30, 1985) at 13.

B. The Justice Department's RICO Guidelines Apply The Prosecutorial Discretion Envisioned By Congress, And Absent From Private Actions, That Prevents Abuse Of RICO

In 1981, the Criminal Division of the United States Department of Justice promulgated "Guidelines" for the exercise of the Department's power to initiate criminal prosecutions under RICO. See U.S. Department of Justice, United States Attorneys' Manual, §§ 9-110.200 - 110.500 (March 9, 1984). The Guidelines were promulgated because the Department recognized the great possibility for abuse if RICO is applied to every set of circumstances that may conceivably be covered by the broad statutory language. These Guidelines in effect formalise the exercise of prosecutorial discretion that Congress envisioned when it wrote this broadly worded statute.

In their "Preface," the Guidelines state that, despite the statutory provision that RICO is to be "liberally construed to effectuate its remedial purpose," it is the policy of the Department of Justice that RICO should only be used "selectively." The Guidelines are designed to assure "that not every case, in which technically the elements of a RICO violation exists, will result in the approval of a RICO charge." The Justice Department will not "approve 'imaginative' prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute." As the Guidelines recognize, "the activity which Congress most directly addressed -- the infiltration of organized crime in the nation's economy" -- is the touchstone for determining whether a RICO charge is warranted.

Moreover, the overall theme of the Guidelines, as stated in their Preface, is that "the consequences for the accused" require "particularly careful and reasoned application" of RICO's purposes before making the decision to charge a RICO violation. Accordingly, the Guidelines insist on careful monitoring and centralized control over the Government's filing of any RICO charge. This centralized monitoring guarantees that the Guidelines will be effectively enforced by officials who are charged with public accountability. In dramatic contrast, the decision whether to file a private RICO claim under the broadly worded statute is currently left wholly to the discretion of entrepreneurial private lawyers. Their sole loyalty is to their private clients, and they have no public responsibility for the consequences of any extravagant allegations.

The Justice Department Guidelines highlight another problem with civil RICO as it currently stands. The Preface states that the Department ordinarily will not add a RICO charge "which merely duplicates the elements of proof of a traditional" statute that specifically covers the conduct in question. One of the major criticisms of the current civil RICO provision, however, is that it creates a general, private federal claim for treble damages even where federal law already provides a carefully crafted set of prohibitions and remedies.

The Justice Department's Guideline III expressly directs that, except in extraordinary circumstances, a RICO count will not be asserted "where the predicate acts consist solely and only of state offenses." Reflecting important considerations of federalism, the commentary explains that this guideline is designed "to underscore the principle that prosecution of state crimes . . . is primarily the responsibility of state authority."

Similar observations apply to the use of the federal courts to litigate civil disputes governed by state law. Nevertheless, the inclusion of "mail fraud" and "wire fraud" in RICO has been used by private plaintiffs as a device for bringing into federal courts what are essentially local commercial or property disputes. This use of RICO has "federalized" state commercial and tort cases.

The statute suggests that any two occurrences of a predicate violation within ten years may be sufficient to show a "pattern of racketeering activity." Guideline IV recognizes that this definition is subject to abuse and provides that no RICO count will be charged "based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."

Most of the private civil cases that have been filed under RICO, by contrast, relate to allegedly fraudulent activity in connection with a single episode or transaction, such as the sale of stock in a single company or the structuring of a particular venture that includes a number of parties. Since each mailing of, for example, a copy of an allegedly misleading financial statement constitutes a separate violation, it is easy for the artful pleader to allege a "pattern" of racketeering in connection with a single commercial episode or transaction. This usage, however, has little to do with the congressional goal of cracking down on racketeers who make their living by engaging in a continuous pattern of illicit activity over a long career.

In addition, Guideline V states that, in order to constitute a violation of RICO, the "pattern of racketeering activity" should have "some relation to the purpose of the enterprise." This sensible interpretation is not followed in the civil cases that have been filed under RICO, where allegedly fraudulent activities conducted by legitimate businesses such as investment banking houses, brokerage firms, accounting firms, law firms, and others are -- even if true -- aberrational rather than related to the purpose of those "enterprises."

Many of the concerns reflected in the Justice Department Guidelines, thus, apply with equal force to private civil litigation under RICO. These internal Guidelines, however, do not regulate the activity of private plaintiffs. Therefore, legislation is necessary in order to erect similar safeguards around the private civil RICO mechanism and in that way to minimize its great potential for abuse.

C. A Prior-Criminal-Conviction Requirement Is The Most Straight-Forward And Workable Solution To The Current Abuse Of Civil RICO

There is one straight-forward amendment to civil RICO that would eliminate the existing abuses, refocus the statute on its intended targets, and adapt the Justice Department's Guidelines to the civil use of RICO. That would be to permit civil claims to proceed under RICO only after the defendant has been convicted of a RICO offense or of one of the predicate offenses. This amendment would effectively curb the abuse of the discretionary power to bring private claims against legitimate business people involved in ordinary commercial activities. It would confine the circumstances in which suits can be filed to those in which public prosecutors have screened those people who may fairly be charged with being involved in crimes from those who should not be subject to accusations of "racketeering". This is the kind of protection that a panel of the Second Circuit read into RICO in the Sedima case and that SEC Commissioner Marinaccio called upon Congress to write into the statute.

The American Bar Association's Special Task Force on Civil RICO also recognized that a prior criminal conviction requirement would eliminate the abuse of civil RICO and restore the statute to the purpose Congress originally intended:

> "Requiring a criminal conviction as a predicate to civil treble damage liability under RICO would alleviate virtually all the problems critics have posed concerning overbreadth of the civil remedy." ABA RICO Task Force Report at 222.

What is needed is legislation that will amend 18 U.S.C. § 1964(c) so that a private civil plaintiff could only bring suit against a defendant who has been convicted either of one of the predicate acts or of a RICO violation itself. In either case, the conviction would have to be for the conduct upon which the private suit is based. (We attach as Exhibit A to this Appendix proposed language to accomplish this result. The suggested amendment would also set a statute of limitations of one year, measured from the latest judgment of conviction for RICO or the civil predicate acts upon which the civil action is based. This proposal is identical to H.R. 2943, introduced on July 10, 1985, by Representative Boucher.)

Under this amendment, civil RICO could no longer be used simply to raise the stakes in or federalize commercial disputes. The plaintiff would have to prove that:

(1) the defendant violated the provisions of RICO by engaging in conduct that violated 18 U.S.C. § 1962;

(2) the defendant has been convicted either of a RICO violation or of one of the predicate acts based on the conduct upon which the plaintiff bases his civil RICO claim;

(3) the plaintiff has been injured in his business or property by the defendant's violation of Section 1962; and

(4) the plaintiff has filed his treble-damage suit within one year of the latest pertinent convictions.

With this change in the law, civil RICO could only be used against persons whom prosecutors have decided to charge with crimes and who have been found guilty of criminal acts. This amendment would restore the central role of public prosecutors originally envisioned by Congress. Before plaintiffs could call upon the treble-damage remedy made available under RICO specifically to deal with organized crime, there would first have to be a determination by the public prosecutors and juries that the defendant was actually engaged in criminal activity.

The ABA RICO Task Force Report agrees that the creation of some prior criminal conviction requirement "would be preferable to the present statute and its intolerable overbreadth." ABA RICO Task Force Report at 238. Nevertheless, instead of this direct and precise solution, the ABA Task Force offers as an alternative a package of ten different substantive changes in the statute in order to achieve the same basic result as the prior criminal conviction requirement -- returning civil RICO to its proper focus. That laundry list of changes, however, is cumbersome. It is likely to raise complex problems in the course of drafting and implementation. In fact, the drafting issues were so unwieldy that the Task Force did not even attempt to offer specific statutory language to implement its proposals.

Furthermore, most changes in statutory language, no matter how minor, raise issues of interpretation and implementation unanticipated at the time of passage. An approach that requires ten major changes is certain to create many new issues. The prior criminal conviction requirement achieves the same result with but one simple amendment. It has already been drafted and its impact has been subjected to intense scrutiny and conjecture by its proponents and opponents alike. As the following discussion demonstrates, despite that intense scrutiny, no major problems that would arise from its implementation have been identified.

The ABA RICO Task Force alternatively suggests that if some version of a prior criminal conviction requirement is adopted, the Congress should consider making treble damages available only where there are prior criminal convictions, but allow private plaintiffs to sue for actual damages even where there have been no previous convictions. ABA RICO Task Force Report at 238. Such a change would, of course, not solve the underlying problem, which is the use of civil RICO for unintended and abusive purposes. Two major opportunities to abuse civil RICO would remain. First, plaintiffs would still be able to increase the in terrorem effect of their suits -- and hence their settlement value, whatever the merits of the cases -- because of the coercive effect of even an unsubstantiated accusation of "racketeering." Second, plaintiffs would be able to "federalize" traditional state law tort and contract claims by recasting them as RICO cases, and thus accelerate the growth of cases on the federal court dockets that rightfully belong in the state legal systems, if anywhere. Thus, all civil RICO claims should be subject to a prior conviction requirement.

D. None Of The Criticisms Of A Prior Criminal Conviction Requirement Is Substantial

Persons eager to preserve the potent weapon which civil RICO has become in ordinary commercial litigation have repeatedly thrown out a laundry list of so-called problems associated with a prior-criminal-conviction requirement. Through repetition -- and undoubtedly because to date these claims have generally gone unanswered -- these assertions have taken on more credence than they deserve, and we find less jaundiced observers, such as the ABA RICO Task Force and the five-Justice majority of the Supreme Court in Sedima, repeating these criticisms. In truth, if these so-called problems are examined one by one, one discovers that there is no real substantial impediments behind the rhetoric.[14/]

[14/] The proof, in part, is in the doing. We discussed earlier cases in which plaintiffs brought civil RICO cases against defendants who had first been convicted on criminal charges. See pp. 16-17, supra. There is no indication in any of these cases that the plaintiffs found insurmountable problems or even substantial difficulties in bringing those lawsuits.

1. "Gutting" the civil remedies

A criminal conviction precondition to private civil RICO actions would not "gut" the remedies available to private parties, as some critics of a prior-criminal-conviction requirement charge. As our earlier discussion demonstrates, there already have been cases in which plaintiffs have used civil RICO to go after defendants who had been first convicted of criminal charges. See pp. 16-17, supra. Cases of this type would continue. Moreover, if there has been no criminal prosecution and conviction, a potential plaintiff would still have available all the other federal and state law remedies that apply to commercial disputes and torts; he would not be left without a remedy.

2. The "private attorney general" rationale

The ABA Task Force suggests that the criminal conviction requirement may be "too restrictive" because it would eliminate "what some courts have labelled the useful 'private attorney general' aspect of Civil RICO." ABA RICO Task Force Report at 238. The Supreme Court majority in Sedima similarly referred to Section 1964(c) as a "private attorney general "provision[]." 53 U.S.L.W. at 5038. This view, however, rests on the erroneous assumption that civil RICO was meant to deputize private claimants and their lawyers to serve as "private attorneys general." The private damage remedy under RICO, however, was not created in order to empower private citizens to take on law enforcement responsibilities, and there is no good reason to view the statute today as serving that end.

No one who has taken a hard look at the problem of organized crime -- not the Kefauver Committee in the 1950s, not the Katzbach Commission in the 1960s, not Senator McClellan's Committee in the 1960s and 1970s -- has ever believed that private civil suits could be an important weapon in the war against organized crime. Significantly, the Department of Justice itself has never suggested that it believes that private citizens should have the right to accuse other persons of crimes, nor has the Justice Department indicated that private suits are necessary to supplement its efforts to attack organized crime.

Indeed, it would be foolish to believe that a private citizen would have the temerity to sue a real organized crime figure for racketeering, unless the government has first prosecuted and convicted him. There is no indication that anyone in Congress entertained that naive belief when RICO was passed in 1970. The lesson of the last 15 years' experience with civil RICO confirms the sensible assumption that criminal conviction is, as a practical matter, a necessary precondition to private RICO suits against the kind of criminal Congress had in its sights. In the few civil RICO cases that have been brought against violent organized crime figures, private suits actually have followed prosecution and conviction, and have not been a substitute for criminal conviction. See pp. 16-17, supra.

Thus, the only impact from adopting a criminal conviction requirement would be to filter out the suits that have nothing to do with the war on organized crime.

Moreover, Assistant Attorney General Trott's testimony before this Committee in May 1985 shows that the Justice Department has brought RICO prosecutions in at least as many cases as civil litigants are using the statute, and the number of federal criminal cases is growing. Federal and state prosecutors, of course, bring thousands of non-RICO prosecutions involving the predicate offenses listed in RICO. It is baseless to assert that the targets of the private civil RICO cases that private lawyers have brought in the absence of prior convictions would have been prosecuted if only federal and state prosecutors had more resources. The simple truth is, as the Executive Director of the ABA RICO Task Force acknowledged elsewhere, these private civil suits are brought in cases that no responsible prosecutor would have treated as criminal. _See_ pp. 17-18, _supra_.

3. Possible effects on public prosecutors

The opponents of the prior-criminal-conviction requirement assert that this requirement could influence the way public prosecutors perform their duties. They speculate:

(1) Federal prosecutors could be subject to undue pressures from private parties with potential civil RICO claims to press RICO-related prosecutions.

(2) Prosecutors may be subject to accusations that they were influenced in their decisions to press RICO-related prosecutions because of the impact on individuals' civil remedies.

(3) Prosecutors may be willing to accept plea bargains that are unrelated to the merits of the case. The criminal conviction requirement, it is suggested, could create a powerful new weapon in the hands of the prosecutor to force defendants to plead to lesser, non-predicate-act offenses. If prosecutors accept pleas to non-predicate act offenses, private litigants would lose their opportunity for civil relief, or at least lose the opportunity to sue certain defendants.

The fact is that public prosecutors already are subject to the entreaties of private parties whose interests are at stake in criminal proceedings. In the full range of potential civil litigation, from murder and arson to securities fraud and antitrust, there are private parties whose ability to win civil damage suits would be vastly enhanced by a successful criminal prosecution. The public prosecutor's duty, however, is to weigh those interests in balance along with other relevant factors in deciding where the public interest lies. There is simply no reason to presume that a RICO statute subject to a prior-criminal-conviction requirement would create pressures qualitatively different from those which already exist, or that the prosecutors would no longer be able to discharge their duties fairly, or that the public perception of the prosecutor's decision-making would be adversely affected.

Nor is there any basis to assume that a federal prosecutor will bargain away a good case against racketeers -- either on the predicate offenses or the RICO charge itself -- and thus foreclose an otherwise proper civil RICO case. Many of the predicate acts listed in the RICO statute do not have "lesser included offenses," and so it would be difficult, if not impossible, to arrange a plea to a non-predicate offense in an organized crime case. Furthermore, plea bargaining in the federal courts has never been as extensive as in the overcrowded and understaffed state court systems. Federal prosecutors simply do not bargain away good cases because of other constraints, such as limited resources. It is virtually unthinkable that federal prosecutors, despite public and congressional oversight, would irresponsibly agree to drop real organized crime cases in plea bargaining.

The decision to enter a plea bargain in federal court is governed principally by three general considerations: (1) the severity of the crime; (2) the record of the defendant; and (3) the strength of the government's case. The United States Attorneys' Manual, which states the rules and guidelines that govern federal prosecutors, sets out eleven factors that the prosecutor must consider in "determining whether it would be appropriate to enter into a plea agreement." The factors at the top of the list include the "defendant's willingness to cooperate in the investigation or prosecution of others," the defendant's criminal record, the nature of the charges, the defendant's "remorse or contrition," the "likelihood of obtaining a conviction at trial," and similar concerns. Only at the end of this exhaustive list does the manual even mention consideration of prosecutorial and judicial resources. See U.S. Department of Justice, United States Attorneys' Manual

§ 9-27.420 (June 15, 1984). Thus, the Department of Justice's own standards will prevent prosecutors from allowing organized crime figures to escape with pleas to minor crimes.

Finally, as a practical matter, it is doubtful that fear of civil liability would be a major factor in a criminal defendant's decision whether to enter a plea bargain. Moreover, if it did provide an additional incentive to get organized crime figures to plead guilty and to cooperate with the federal authorities, Congress should encourage that result, not fear it. The primary purpose of RICO has always been, and should remain, to increase the weapons available to federal prosecutors in fighting organized crime. If the rare case comes along in which the prosecutor concludes that he can use the threat of a private civil suit to gain cooperation from a racketeer, purely private financial interests should not be allowed to frustrate the public interest in effective criminal law enforcement.

4. Possible effect on witness credibility

Another concern that has been raised is that a witness's credibility would be subject to challenge at a criminal trial if he stands to gain from the conviction of the defendant. Here again, a criminal conviction requirement would not qualitatively change the present situation. Any witness with an actual or potential civil claim against the defendant has a financial and personal stake in the success of the criminal prosecution; thus, the witness's credibility is already subject to challenge on that basis. Moreover, under modern notions of collateral estoppel, if the defendant is convicted on the charges, the factual issues resolved against the defendant by the verdict would in all likelihood be considered settled against him in a civil suit. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Thus, under RICO as well as under other statutes, the benefit accruing to a victim/witness from a conviction in a parallel criminal proceeding already provides a basis for attacking the witness's credibility in the criminal trial.

Indeed, if a criminal conviction is not a precondition to civil suit, the witness may have a civil suit pending concurrently with his testimony in a criminal case. In the jury's eyes, this direct and specific interest in obtaining a conviction may cast more doubt on the witness's credibility than would the mere possibility that the witness might file a civil suit if the defendant is convicted. Thus, by postponing the ability to file a civil RICO suit, Congress could actually minimize questions about the complaining witness's credibility at the criminal trial and thereby enhance the statute's primary purpose, the prosecution and conviction of organized crime figures.

5. Delay in bringing the civil RICO suit

Another category of issues raised about the prior-criminal-conviction requirement involves the timing of civil suits. The comments generally take the following form:

(1) Uncertainty would exist as to when the statute of limitations begins to run on the RICO claim, and whether the civil plaintiff must wait until criminal appeals are exhausted.

(2) It is unclear what effect reversals or pleas of nolo contendere would have on civil RICO claims.

(3) Private parties would be forced to divide causes of action and bring two separate suits, because they have to go forward with their non-RICO claims before the statute of limitations runs out.

(4) Because of the long interval that can pass between the occurrence of a crime and a conviction, the private plaintiff's ability to pursue a civil remedy successfully could be prejudiced by (a) the staleness of evidence and (b) the defendant's dissipation or concealment of assets.

None of these worries is substantial. There is no difficulty in establishing the beginning of the limitations period. A claim does not accrue for purposes of a statute of limitations until all the elements of the plaintiff's cause of action exist. See, e.g., Imprc Products, Inc. v. Block, 722 F.2d 845, 850 (D.C. Cir. 1983), cert. denied, 105 S. Ct. 327 (1984). If a prior criminal conviction constituted a necessary element of a civil RICO claims, the statute of limitations would not begin to run until the government secured the pertinent conviction. In any event, the amendment can include language that specifically links the limitations period to the date of the latest pertinent judgment of conviction, as does H.R. 2943.

The other issues can be handled equally easily under well-established principles of judicial procedure. By analogy to principles of res judicata and collateral estoppel, which take effect as soon as the trial court enters its judgment, the civil RICO suit could commence as soon as a judgment of conviction is entered and need not wait until appeals have run their course. If one of the predicate convictions is reversed on appeal and remanded for a new trial, the civil action could be stayed during the proceedings on remand, or could be dismissed without prejudice to refiling at a later date if the defendant is re-convicted.

If in the criminal proceeding the defendant pleads _nolo contendere_ or enters the kind of "no contest" plea the Supreme Court approved in _North Carolina v. Alford_, 400 U.S. 25 (1970), the judgment in either case would lay the foundation for a civil RICO complaint. The law treats either of those pleas as a confession of guilt, and the court renders a judgment of conviction. _See id_. at 35-37; _Lott v. United States_, 367 U.S. 421, 426-27 (1961). Once a conviction is entered, the private plaintiff could proceed accordingly with a RICO suit.

Nor is there any problem created because certain related causes of action might accrue before the civil RICO claim accrues. The premise underlying this concern is that the civil RICO remedy _duplicates_ other existing federal or state remedies that the plaintiff may pursue. Since the purpose of creating the civil RICO remedy was to authorize redress for people who otherwise have _no_ legal rights under other statutes and legal theories, this is an ironic objection. In cases of that sort, a potential RICO claim should be viewed as merely cumulative. The plaintiff has no legitimate grievance if he must proceed with other remedies that the law already makes available to him.

In any event, if a plaintiff has both a potential RICO claim and a ripe claim under another legal theory, normal rules of procedure would govern. The plaintiff may bring his non-RICO claim on a timely basis. If he wishes to defer further proceedings in that suit until any criminal charges against the defendant are resolved, he may seek to stay his civil suit until the RICO claim ripens. If he proceeds with the non-RICO claim, the established principles of res judicata and collateral estoppel would govern the impact of the outcome of that first action on any later RICO action. See 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶¶ 0.441-0.448 (2d ed. 1984). If he loses his non-RICO case claim after a fair opportunity to establish it, he has little reason to complain that this decision would bar an overlapping RICO-related claim based on the same conduct.

If, by contrast, the plaintiff wins a damage award in his non-RICO suit based on the predicate acts, and then brings a proper RICO case, the damage awards may not completely overlap. His RICO claim may relate to a distinct type of injury and, in any event, would be trebled. To the degree that there is duplication, the second court would reduce the later award under established legal principles preventing duplicative awards for the same injury. See, e.g., American Mail Line, Ltd. v. Weaver, 408 F.2d 674, 675 (9th Cir. 1969).

The concerns expressed about the staleness of evidence also suffer from similar underlying defects. A problem of stale evidence would seldom arise. As previously discussed, under modern notions of offensive collateral estoppel, the criminal conviction would probably establish the defendant's civil liability in the ensuing civil RICO suit, without even the need for further evidence. Moreover, all of the evidence collected through the government's resources and presented at the criminal trial would be available to the civil plaintiff.

In any event, the plaintiff with a civil RICO claim may have to depend, for practical purposes, on a prior criminal proceeding. RICO defines a "pattern of racketeering," which even the civil plaintiff must allege and prove, as at least the commission of two predicate offenses within a ten-year span. Thus, no one may bring a civil RICO claim until the defendant has committed at least a second predicate offense, at which point the first offense may well be quite dated. In the absence of a prior criminal prosecution, a private party could have substantial difficulty proving the earlier predicate offense, especially if it involved an unrelated transaction, as it should. Thus, not only is the "lag time" in government prosecutions unlikely to undermine a plaintiff's ability to prove a proper civil RICO case, prior prosecution may well be a necessary component of a successful private civil case.[15]

The prospect of dissipation of assets is also illusory. Under the 1984 amendments to RICO, Congress gave the government expanded powers to bring forfeiture proceedings in conjunction with criminal charges under RICO and to obtain preliminary relief in the form of seizure of assets even prior to indictment. See Sec. 302, P.L. 98-473, 98 Stat. 2040-44 (amending 18 U.S.C. § 1963). The government, therefore, has both the power and the incentive to prevent the defendant from secreting his assets. Moreover, under the 1984 amendments, the Attorney General is empowered to use the funds actually obtained through criminal forfeiture to "restore forfeited property to victims" of a RICO violation or "take any other action to protect the rights of innocent persons" and "award compensation to persons providing information resulting in a forfeiture . . . ." 18 U.S.C. § 1963(h)(1) and (3). Thus, prior criminal proceedings actually may enhance the ability of civil plaintiffs to secure compensation.

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[15] It is true that some civil RICO plaintiffs have manufactured a "pattern" out of essentially simultaneous events, principally because separate acts of mail fraud, wire fraud, or securities fraud can be pleaded for each instance in which the mail or telephone is used or each time a share is sold. See pp. 5-6, supra. But these are instances in which RICO is being abused to apply only to a single episode or transaction.

In cases actually involving organized crime, the predicate acts will be more widely separated in time. The Justice Department recognizes that this separation in time is a characteristic of a proper RICO case; under its RICO guidelines, the Department prohibits use of RICO to challenge conduct that is simply part of a single episode or transaction. U.S. Department of Justice, United States Attorneys' Manual, ¶ 9-110.340 (March 9, 1984); see pp. 48-49, supra. As the Department explicitly states in explaining this limitation, "the purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute." Id. at ¶ 9-110.341; see also Sedima, 53 U.S.L.W. at 5038 n.14, 5039 (suggesting the statutory requirement of proof of a "pattern" demands something more than just proof of two predicate acts within ten years).

Nor should one lose sight of the fact that persons with claims for relief arising from the predicate acts may press those claims immediately. If they have damage claims for securities fraud or commercial fraud, for example, they would not be inhibited from bringing those claims simply because there is a separate limitation designed solely to assure that civil RICO claims deal only with actual criminal conduct. Rule 64 of the Federal Rules of Civil Procedure provides ample remedies to the private plaintiff to assure that the defendant preserves enough assets to satisfy a potential judgment.

6. Inability to reach some of the culprits

Finally, questions have been raised about whether it is sound to prevent private plaintiffs from bringing civil RICO suits against actual criminal offenders who, for some reason not related to their culpability, are not convicted.

We have already touched on one of these situations, where federal prosecutors are able to get one of the suspects to cooperate by allowing him to plea bargain to a non-predicate offense or even by immunizing him from all criminal liability. See, p. 60, supra. Traditionally, prosecutors have had great difficulty getting such cooperation from organized crime figures, because of the enormous risks faced by the member of organized crime who aids the government. The Department of Justice and Congress, therefore, should embrace, not reject, the opportunity to create a new incentive to get persons to give evidence against organized crime. Moreover, the private party in these hypothetical situations will still have other potential defendants to sue -- those against whom the cooperating culprit testifies. It is also reasonable to assume that it will be the minor figures who are given the opportunity to plea bargain; the major targets, who are likely to have greater assets, will remain exposed to private civil RICO claims.

The other points voiced by opponents fall equally short. They are:

> (1) If the indictment is dismissed for reasons unrelated to the merits, the civil plaintiff will never be able to sue.
>
> (2) Without changes in the legal concept of derivative liability, if individual principals are convicted of predicate acts, but the organization holding the assets is not, the civil plaintiff will not be able to reach the assets necessary for compensation.
>
> (3) If the criminal defendant remains a fugitive from justice, the criminal case will remain unresolved and the private plaintiff will go uncompensated even though the fugitive has assets in this country against which a civil award could be collected.

In fact, a fatal dismissal of an indictment for reasons unrelated to the merits occurs only in the rarest of cases. In virtually all instances in which the indictment is dismissed on technical grounds, the government can simply reindict. Federal law specifically provides for an extension of all statutes of limitations in order to guarantee federal prosecutors just such an opportunity to reindict. See 18 U.S.C. §§ 3288-89.

Opponents of the criminal conviction requirement also conjure up the specter of a serious criminal case that the government cannot successfully prosecute after a court suppresses critical evidence because it was seized in violation of the Fourth Amendment. This is a far-fetched fear. Even before United States v. Leon, ___ U.S. ___, 82 L.Ed.2d 677 (1984), in which the Supreme Court created a substantial exception to the "exclusionary rule" for cases in which the police rely in good faith on a search warrant, the exclusionary rule actually had led to suppression of evidence in a miniscule proportion of all criminal cases. The empirical studies cited by the Supreme Court in the Leon case found that the exclusionary rule affected the prosecution in the cases of only about 1% of the persons arrested for felonies. 82 L.Ed.2d at 688 n.6. Since these figures relate to all persons arrested, the percentage of arrestees who were actually guilty but escaped conviction because of the suppression of evidence must have been even smaller.

Even those figures overstate the effect of the exclusionary rule in organized crime cases, since most challenged searches and seizures involve street crimes investigated by local police, not carefully planned and supervised federal investigations of organized crime. It will be the careful investigations of organized crime activities, where search warrants are typically used, that will particularly benefit from the Supreme Court's recent decision in Leon to eliminate the exclusion when investigators rely on warrants.

Furthermore, even when the exclusionary rule applies, its scope is extremely limited. The illegally seized evidence may be used against all defendants except the particular person whose Fourth Amendment rights were actually violated. Brown v. United States, 411 U.S. 223 (1973). Thus, the case against all co-conspirators and other defendants accused of participating in the racketeering enterprise would be unaffected. At bottom, then, only in the rarest of cases, if ever, would the Fourth Amendment block conviction on RICO-related charges and deprive an otherwise deserving plaintiff of the opportunity to pursue a civil RICO recovery.

Similarly insubstantial is the speculation that a conviction requirement could insulate from recovery the assets that a convicted racketeer has placed within some unconvicted enterprise. It is quite unlikely that an organized crime figure will place his assets in a business organization that is outside of his personal control. Rather, the enterprise will be operated in a form -- such as a partnership or a joint venture -- where the assets can be reached through a suit against the individual. Even if the criminal resorts to a corporate form, the assets will still be reachable for at least one of two reasons. The criminal principal will own or control the stock of the corporation, in which case that stock, representing the value of the assets, can be reached. If the criminal does not own the enterprise outright, then he will undoubtedly be milking it or otherwise misusing the corporate form in a manner that will allow the court to "pierce the corporate veil," thus permitting the civil plaintiff to reach the assets at issue. See generally Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982). In sum, no criminal is simply going to give away his ill-gotten gains. As long as the assets remain his, the law provides the necessary tools to break through any formal barriers. Thus, the problem supposedly posed by the conviction of the "principals" but not the "organization" is no problem at all.

Similarly, the defendant's fugitive status will rarely, if ever, stand in the way of a civil RICO claim. There are few places left in the world for an indicted criminal to hide. According to the Office of the Legal Adviser at the Department of State, the United States currently has criminal extradition treaties with over one hundred nations, including all of the countries in which a wealthy racketeer might want to take refuge. Moreover, Congress cannot realistically assume that all members of a criminal enterprise will successfully flee the United States and in that way escape conviction. Only in that extraordinarily unlikely event would a plaintiff be left with no target for a civil RICO suit. Thus, few if any proper civil RICO plaintiffs will be left without any civil recourse against any racketeer.

VI. CONCLUSION

The need for reform is clear. The nature of the reform is clear. And the responsibility for reform is clear. Congress should amend the civil provisions of RICO to focus the private remedy on its original purpose of aiding the war against organized crime, while curing its capacity to bludgeon innocent business people.

The easiest and best method to accomplish this purpose is to amend 18 U.S.C. § 1964(c) to create a prior-criminal-conviction requirement in private civil RICO actions. This type of amendment will give rise to the fewest complications. None of the arguments against this requirement stands up under analysis. The proper civil RICO plaintiff -- the victim who has been damaged by actual criminal activity committed by a repeat criminal offender -- will have a full and effective remedy. The only losers will be those persons who should have no legitimate claim to invoke this special statute at all.

APPENDIX A

Amend subsection (c) of 18 U.S.C. § 1964 ("Civil remedies") to read as follows (new matter underscored, deleted matter bracketed):

* * *

"(c) Any person injured in his business or property by reason of conduct in [a] violation of section 1962 of this chapter may sue [therefor] any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or a violation of section 1962 in any appropriate United States district court, and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. A civil action under this subsection may not be commenced against a defendant later than one year after the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962 with respect to the conduct out of which such action arises."

* * *

EXPLANATION

This amendment would limit the abuse of RICO's private, civil treble-damage mechanism under which claimants in many types of commercial disputes have been able to gain unwarranted leverage for their positions by branding their adversaries "racketeers." The amendment would implement

Congress' judgment that the use of RICO's powerful weapons against "organized crime" should rest on the expertise and discretion of public prosecutors. The amendment would achieve those objectives by making it clear that the civil treble-damage provision is to be used only against persons whom prosecutors have decided to charge and whom juries have decided to convict of criminal violations of RICO or of the underlying "predicate" offenses.

Under this amendment the civil remedy would dovetail with the careful screening performed by the Department of Justice in applying its guidelines to distinguish cases that are properly subject to the special RICO provisions from those that are not. It also would rely on determinations by federal and local prosecutors and juries that the defendants were actually engaged in criminal activity. Accordingly, the special civil treble-damage provisions of RICO would be directed only at those persons who may fairly be viewed as engaged in the business of "organized crime." Ordinary commercial disputes and tort claims would be left exclusively to the other federal or state remedies that appropriately apply to them.

The CHAIRMAN. Our next witness is Mr. Theron H. Peace, who is one of the outstanding certified public accountants in the State of South Carolina. Incidentally, he has been the certified public accountant for the committee on my campaign for a long number of years and has done an outstanding job. We are very pleased to have him here.

Mr. Peace, you may proceed.

Mr. PEACE. Thank you, Mr. Chairman.

It is a pleasure for me to appear before the committee this morning to express my support for legislation to amend the Federal RICO law that would limit the use of the civil remedy provision of that statute.

The committee has just heard the testimony of Mr. Ray Groves, chairman of the AICPA, and I want to associate myself with his statement. He has expressed the views shared by accountants throughout America who are subject to lawsuits alleging racketeering violations.

Mr. Chairman, as you know so well, in politics and in business, there is nothing more important to an individual than his or her reputation in the community. If tarnished, it can be devastating to an individual, his family, and associates.

But that is what can happen with the careless use of the civil RICO provision in an otherwise ordinary commercial dispute. The mere allegation of a violation of the Federal racketeering statute could ruin the good reputation of an accountant or accounting firm.

I know that the Chairman, in earlier statements on the Senate floor and in a previous hearing, has expressed his intention to support legislation amending the civil RICO provisions.

Now that the U.S. Supreme Court has ruled in a recent decision that civil RICO can be alleged without a prior criminal conviction, it is even more urgent that congressional action be taken.

A previous witness, Congressman Boucher of Virginia, has introduced a bill in the House which I believe is an appropriate response to the problems facing the accounting profession due to the misuse of the civil RICO provisions. His bill, as I understand it, would allow the use of civil RICO, but only after a prior criminal conviction had been obtained for one of the underlying criminal offenses. That approach seems to me to be a simple, straightforward way of keeping the civil remedy on the statute books, but for use only in cases where Congress clearly intended it to be used—against organized criminal elements of our society, not legitimate businessmen.

Mr. Chairman, I want to thank you for giving me the opportunity to testify today and for your leadership on reform of the RICO statute.

The CHAIRMAN. Thank you very much, Mr. Peace.

We will now be glad to hear from Mr. Robert H. Hodges, Jr., who used to be a member of my staff in Washington, a very able lawyer, and who is now speaking on behalf of the South Carolina Bankers Association as well as the American Bankers Association.

Mr. Hodges, we are glad to have you with us.

Mr. HODGES. Thank you, Mr. Chairman.

I am executive vice president of the South Carolina Bankers Association, but I am appearing today on behalf of the American Bankers Association to discuss some of the problems that commercial banking has had with the Racketeer Influenced and Corrupt Organizations Act of 1970, known as you well know, by the acronym, RICO.

RICO was enacted 15 years ago as a tool for fighting organized crime by attacking its efforts to infiltrate legitimate business. The intent of the law was and is, we feel, a very worthy one, and the banking industry fully supports it. And yet, the intent of Congress in passing the Corrupt Organizations Act has itself been corrupted by recent developments.

Ironically, in the past few years, RICO has been used as a weapon against the beneficiaries of the statute—legitimate business—securities firms, accounting firms, and of particular interest to me and to the American Bankers Association, commercial banks. Plaintiff attorneys have turned ordinary State common law commercial disputes into Federal racketeering cases, and thus have turned the statute on its head.

In the case of commercial banks, for example, so-called prime rate lawsuits have been filed in at least 16 States. Typically, these occur where the borrowers received loans tied to prime, and they define the prime rate as the best rate available to the bank's most creditworthy customers. They then allege that the banks may have made loans lower than prime rate, which then makes the prime rate as announced in fact, fraud. They then state that if the mails are used in connection with the strict distribution of the prime rate, which of course is done on a regular basis, then this becomes mail fraud within the meaning of the statute.

If the bankers do this twice or more—and of course, bankers use the mails every month to send out notices—a "pattern of racketeering activity" has occurred. Bankers make money through this pattern and use the money in the conduct of the bank's business. This series of charges, taken together, the plaintiffs allege, is sufficient to satisfy the elements of the statute necessary to entitle them to treble damages under section 1964(c) of RICO.

Setting the prime rate, and even defining what it means in a modern economy, is an extraordinarily complicated thing—far more so than the plaintiffs make it out to be. Suffice it to say that the banking industry believes that there is no fraud inherent in tying an interest rate to some sort of a benchmark figure—whether it is called a prime rate or something else.

We also feel that if this concept is to be challenged in court that it should be in the context of an ordinary State commercial law case.

The existence and use of a treble damage racketeering statute against banks, usually class action cases, have very damaging defamatory effects. They create a powerful and unfair incentive for the bank to settle out of court even those cases in which it feels that there is no merit. The risk of losing big is just too great because of RICO.

Senator **Metzenbaum**. Can you give us some specific examples?

Mr. **Hodges**. Of settlements?

Senator **Metzenbam**. Yes.

Mr. HODGES. Senator Metzenbaum, of course, there is the major case out of Atlanta where there was a substantial settlement in multiple millions of dollars. There are a number of cases where banks have settled, but for the very reason that they settled, of course, they have not publicized these settlements. In other words, there is the in terrorem effect of the idea of being labeled "racketeering" itself in order to avoid publicity. Of course, they do not want these publicized.

Senator METZENBAUM. I guess——

The CHAIRMAN. Senator, would you mind letting him finish his statement, and then we will ask all of them questions, if that is agreeable to you. I thought we would just let all of them complete their statements first.

Senator METZENBAUM. Sure.

The CHAIRMAN. You may proceed, Mr. Hodges.

Mr. HODGES. Thank you, Mr. Chairman.

In summary, I would just state that the U.S. Supreme Court has concluded that "RICO is evolving into something quite different from the original conception of its enactors." The Court also found that the language of the statute was so broad that it would not allow for any narrowing by judicial construction. As a result, defendants in ordinary commercial disputes will now be described as "racketeers" when they use mail or telephones in their businesses. It is an intolerable situation which the Supreme Court has invited Congress to correct.

Senator Hatch's bill, S. 1521, we think, is an excellent one, and I want to commend the Senator especially on his statement in the Congressional Record on Monday, which very well sets out the problems that we face in connection with this.

Other suggestions have been carving out exceptions for regulated industries, including banks, which we feel has merit.

All of these proposals, Mr. Chairman, we believe have merit, and we believe that whatever action Congress ultimately decides to take, that they should keep in mind its original intent in 1970. That is, giving victims a remedy against organized criminal infiltration of legitimate business.

The American Bankers Association will support any legislative initiative which will return the remedies for normal, everyday commercial disputes to the States or to applicable Federal statutes, where they belong.

Thank you, Mr. Chairman, for this opportunity.

The CHAIRMAN. Thank you very much, Mr. Hodges.

[The statement follows:]

TESTIMONY

OF

ROBERT H. HODGES, JR.

ON BEHALF OF

THE AMERICAN BANKERS ASSOCIATION

Mr. Chairman and members of the Committee, my name is Robert H. Hodges, Jr. of Columbia, South Carolina. I am Executive Vice President and General Counsel of the South Carolina Bankers Association.

Today, I am appearing on behalf of the American Bankers Association to present the views of the commercial banking industry on the subject of possible amendments to the Racketeer-Influenced and Corrupt Organizations Act of 1970— known by the acronym RICO. The American Bankers Association is a national trade association whose members' combined assets comprise approximately 95 percent of the industry total.

As the Committee is well aware, RICO was enacted 15 years ago as part of an Omnibus Crime Control Act. The intent of Congress at the time was clear enough. The law was designed as a tool for fighting crime by attacking its efforts to infiltrate legitimate business. Among other things, the law provided a civil remedy to victims of the kind of racketeering activity prohibited by the statute. A successful plaintiff in a RICO case is entitled to treble damages, court costs and attorney's fees. The intent of the law was, and is, a worthy one, which the banking industry fully supports.

And yet, the intent of Congress in passing the Corrupt Organizations Act has itself been corrupted by recent developments.

Ironically, a few years ago, resourceful plaintiff's began to use RICO as a weapon against the intended beneficiaries of the statute—legitimate businesses: securities firms, accounting firms and—of particular interest to me and to the ABA—commercial banks. Plaintiff attorneys have turned ordinary state common law commercial disputes into federal racketeering cases, and thus have turned the statute on it head.

In the case of commercial banks, for example, so-called "prime rate" lawsuits have been filed in at least sixteen states. Typically, it is charged that borrowers received from the defendant banks loans at interest rates tied to the "prime rate". The "prime rate", according to the borrowers is the best rate available to the banks' most creditworthy customers. However, according to the plaintiffs, the banks may have made loans at lower rates than the announced "prime rate" to some customers. That is claimed to make the announced prime rate a "fraud".

As bankers communicate interest rate information to their customers through the mail, the "fraud" becomes "mail fraud" within the meaning of the statute. If the bankers do this twice or more (and, of course, bankers mail statements every month), it is said to constitute a "pattern of racketeering activity" within the meaning of the statute. Bankers make money through this "pattern", and use the money in the conduct of the bank's business. According to the borrowers, this series of charges, taken together, satisfies all elements of the statute necessary to show that they are entitled to the treble damages allowed by law.

Setting the prime rate, and even defining what the term means in a modern economy, is an extraordinarily complicated thing—far more so than the "prime rate" plaintiffs make it out to be. I will not go into the details of why this is so, because that is not the issue before the Congress today. Suffice it to say that the banking industry believes that there is no fraud inherent in tying an interest rate to some sort of a benchmark figure—whether it is called a "prime rate" or something else. We also feel that if this concept is to be challenged in court it should be in the context of an ordinary state commercial law case.

The existence and use of a treble damage "racketeering" statute against banks in these cases, usually class action cases, has very damaging defamatory efforts. It creates a powerful and unfair incentive for the bank to settle out of court even those cases in which the bank believes that there is no merit to the charge. The risk of losing big is just too great, because of RICO.

To my knowledge, there has not yet been a jury verdict in favor of a plaintiff or plaintiff class in a prime rate RICO case, but there have been multi-million dollar settlements; and the courts have permitted prime rate RICO cases to procede to trial. The courts do so reluctantly. One United States Circuit Court of Appeals said:

> "It does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute."

(Haroco Inc. v. American National Bank & Trust Co. of Chicago, 7th Circuit, 1984).

And yet, the court felt compelled, by the plain language of the statute, to hold that the complaint in that case stated a cause of action under the RICO statute.

The United States Supreme Court, in holding that RICO could be applied to ordinary commercial disputes between or among legitimate businesses, concluded that "RICO is evolving into something quite different from the original conception of its enactors". Notwithstanding that, the Court found that the language of the statute was so broad that it would not allow for any narrowing by judicial construction. As a result, plaintiffs in ordinary commercial disputes will be able to assert treble damage actions against legitimate businesses (now to be characterized as "racketeers") who use the mail or telephones in their business. It is an intolerable situation which the Supreme Court has invited Congress to correct.

Several bills have been introduced in Congress designed to resolve this problem, there have been a variety of suggestions; for example: adding the requirement that there be a prior conviction for criminal racketeering activity, or a conviction for two or more of the underlying offenses before a civil RICO case can be filed; carving out exceptions for regulated industries where another cause of action already exists; and deleting "mail fraud", "wire fraud" and "securities fraud" from the list of predicate offenses. Another proposal would require a plaintiff to plead and prove one or more acts of mail fraud plus one or more of another of the predicate offenses.

All of these suggestions have merit. We believe that whatever action Congress ultimately decides to pursue should give due regard for the original intent of the enactors in 1970. That is, giving victims a remedy against organized criminal infiltration of legitimate business, while at the same time limiting the effect of the statute, to that important goal. That the problem be solved, however, and solved quickly, is more important than the precise method chosen for solving it. The American Bankers Association will support any legislative initiative which will leave the remedy for garden variety commerical disputes to state common law or to applicalbe federal statutes, where it belongs.

Thank you, Mr. Chairman, for the opportunity to present our views to the Committee. I will be pleased to answer any questions.

The CHAIRMAN. I believe that completes the panel, so we will now propound questions.

Mr. Groves, as you mentioned in your testimony, the U.S. Department of Justice may be developing its own proposals aimed at reforming civil RICO provisions while preserving tough criminal sanctions. Do you feel that the restrictions you favor on private civil suits will in any way protect illegal racketeering activities?

Mr. GROVES. No, nor would we be for anything that would do anything like that. We certainly favor keeping the strong criminal sanctions and would not want anything to be suggested that would reduce that.

The CHAIRMAN. Mr. Hodges, I have one question for you. I believe you mentioned that there are many incentives for settling private civil RICO actions even when strong legal defenses are available. Could you elaborate on why the risk of defending such actions is so high?

Mr. HODGES. Well, Mr. Chairman, as I noted earlier, the defamatory effect, of course, of being labeled a "racketeer" in itself is a strong incentive for banks and other industries, legitimate industries, to settle rather than to go to court in these cases. There are also the broad discovery rules which the Federal court provides, which can result in abuses.

There was a North Carolina bank, for example, which was asked to provide its daily ledger transaction sheets for back to 1977, and this would have meant the equivalent of 6,000 pages per working day, going back to 1977. So you can see the expense of these cases, even if there is no merit to it; the expense of defending it, not only in legal fees, but in executive time, can be tremendous.

The CHAIRMAN. Thank you.

The distinguished Senator from Ohio, Mr. Metzenbaum.

Senator METZENBAUM. I came late, because I was at another committee hearing. I understand the problem you are talking about, and that is the use of this antiracketeering statute to bring actions that are not truly in the nature of racketeering.

But my question really has to do with whether there are examples of specific abuses that have occurred. You say that the bank in Atlanta made a settlement of several million dollars. Maybe they got off cheap—I do not know. I have no way of knowing. I do not know anything about the facts. So I really have to say, because somebody made a settlement does not necessarily indicate that there was not a valid claim there. In fact, it seems to me that if a defendant is sued under RICO and then makes a settlement, that there almost is an admission of being "a little bit pregnant" or "a little bit guilty," although every lawyer agrees that the defendant denies liability and makes every assertion that there is no liability, but in order to dispose of the matter, is paying *x* dollars. My concern is that I think there is somewhat of a burden of proof on those who are here, asking us to amend this statute, to tell us more than generalities as to why it should be amended. I think there ought to be some egregious cases that you can point to. When we have dealt with antitrust cases, we had in front of us cases where there are $900 million in verdicts, and at least we can understand that. We may agree or disagree as to whether it was right or wrong.

In this instance, I am trying to get more than conversation and generalities. Perhaps you already testified as to that, and I was not here, but if somebody could help me along that line, I would appreciate it.

The CHAIRMAN. Would any member of the panel care to answer that?

Mr. BARREAUX. Senator Metzenbaum, there are any number of specific cases where corporations that are clearly not racketeering organizations have been sued. A lot of data has been provided in the appendix that we have asked be attached to the hearing record.

Another case worth mentioning, a previous witness, the Colt Industries witness, indicated before Mr. Boucher's committee that their corporation was sued, and they entered into a settlement because they simply did not think it wise to let the alleged racketeering charge stand in the tens of millions of dollars. I know your concern about——

Senator METZENBAUM. What company was that?

Mr. BARREAUX. Colt Industries. I do not know the specifics of that, but I am sure that their witness would be happy to provide information.

But if you look at the list of defendants that have been outlined in our white paper on the issue, I think you would find it compelling.

Mr. GROVES. Senator, if I may just add on to Mr. Barreaux's comments, the remedies available in addition to RICO were preexistent. That is, there are laws that avail themselves to the plaintiffs and the defendants in these various cases. It is the intimidation that comes with not only being labeled a racketeer, but with the threat of treble damages, and basically, the accounting profession cannot afford a $900 million settlement. We have trouble getting insurance today. And that is one of the reasons the intimidation is so strong, the difficulty in getting insurance. And the underwriters are very scared about these kinds of cases and even covering us for insurance.

Senator **Metzenbaum**. Well, Mr. Groves, you are not telling me that the accounting profession is having difficulty getting insurance because of RICO. Isn't the accounting profession having difficulty getting insurance because of so many transgressions and so many public acknowledgments of their failure to do the thing that they should have done, and as a consequence, many stockholders have been hurt? If there is any profession in this country in the last several years that has suffered embarrassing publicity, I think it is specifically the accounting profession. It is hardly every 6 months that you do not read of another instance where one of the "big seven" or "big eight" is involved in some kind of situation that should have been made public. Isn't that the reason that the accounting profession is having difficulty getting insurance, and not RICO?

Mr. **Groves**. Well, we have several reasons, Senator, why we have trouble getting insurance, by having sat with the underwriters who do control the amount that we get; RICO is one of the things that play very heavily on their minds. But you are correct, there have been other reasons, too, and we are also part of everybody else who has trouble getting liability insurance today. But RICO is very, very much on their minds, I assure you, Senator; I have discussed it with them.

Senator **Metzenbaum**. Well, I do not doubt that it is on their minds, but I am not sure that that is the only reason.

Mr. **Grove**. No, it is not. I will not claim it is the only reason. But it is a significant one.

Senator **Metzenbaum**. Now, Mr. Barreaux, I have that appendix—"The authority to bring private treble damage suits under RICO should be reformed"—is that the appendix you are speaking to?

Mr. **Barreaux**. Yes, I believe it is.

Senator **Metzenbaum**. And you said that there is a list of examples to be found in that appendix. I have it here. Where is that list?

Mr. **Holtman**. Page 19.

Mr. **Barreaux**. One other group that has been sued under civil RICO and that should be of interest to this committee to demonstrate the almost ridiculous lengths that it is being used for is the FBI.

Senator **Metzenbaum**. Say that again, sir.

Mr. **Barreaux**. The Federal Bureau of Investigation is being sued under civil RICO. You may want to inquire of them how they view this statute and the manner in which it is being used.

Senator **Metzenbaum**. Is that in connection with the Presser matter? [Laughter.]

Mr Barreaux. No. It is in connection with a sting operation.

Senator **Metzenbaum**. Well, Mr. Chairman, I would say to this group of witnesses and to others as well, that I think that there may be value in coming forward with some clarifying language, modifying language, but I am not certain that Congress should be called upon, and I do not know that any of you are calling upon us to repeal the entire statute.

Senator Hatch, I do not know what your bill does; I think you just put it in 2 days ago. Is it for clarification?

Senator HATCH. It clarifies and it resolves a lot of these problems that have arisen that appear to be excessive approaches in the law. And I think you are basically right. My bill preserves the right to bring RICO cases under appropriate circumstances, and certainly, especially for traditional mobster or racketeering activity.

Senator METZENBAUM. I will take a look at it.

Senator HATCH. Yes, if you would.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Well, as I view it, this law is being used by some very resourceful lawyers all over the country to embarrass legitimate business enterprises into settlements that they would not otherwise make, just because they do not want to be called racketeers. The epithet itself is bad enough for somebody who values his or her reputation, or a business that values its reputation, that from a nuisance value, just if you consider what it costs to defend one of these suits, it is better to settle and get it out of the road than to have these headlines all over the local newspapers that "blank" firm is being sued for racketeering.

And I have had a number of bankers and a number of other legitimate businesses in Utah come to me and say they are being sued under this RICO statute, and they have had impeccable reputations all these years. One major lawsuit concerned Zion First National Bank in northern Utah. They had to go through all the ignominy of being called racketeers. I know little about the case, but I did chat with some of the representatives of that bank, and they were really upset about it, as I think most bankers would be.

I think also, civil RICO has been distorted to harm legitimate businesses in other ways. It now permits, for example, a customer who elects not to sell a security when the market is declining to sue his broker solely because the broker might have recommended over the telephone that the customer not sell the security. And you know, you are aware of those types of lawsuits, am I right—there are dozens of those, where the broker, who cannot foresee the future, gives the wrong advice and therefore is sued as a racketteer.

I do not care who looks at that; they have to be upset. I remember another example, a recent case in California where an insurance company was sued in Federal district court when it refused to make payments under a directors and officers liability policy on the basis that the insurance claimant, in making application, made misstatements in his application policy. The plaintiffs alleged a RICO violation that the company had engaged in a scheme to issue such policies without intending to fulfill its obligations. Now, most insurance companies are going to decline coverage or decline payments where falsehoods have been made by the applicants in their application form, and yet to get sued for that in Federal court under a racketeering law, it seems to me, just shows how much this RICO statute is being misused in our society today.

As I mentioned earlier, I recently introduced S. 1521—and Mr. Hodges, you have been kind enough to say that you support this bill and you think it is an excellent bill to solve these problems. Among other things, this bill requires that for the purposes of a civil RICO suit, one of the "predicate acts" must be racketeering activity other than mail, wire, or securities fraud. In the opinions of you, Mr. Groves, and you, Mr. Hodges, let me ask the two of you this question—in your opinions, are these three "predicate offenses" the primary sources of litigation which takes civil RICO beyond its purposes?

Mr. Hodges. Well, yes, sir, there is no question about it, Senator. If those were removed as "predicate offenses" as far as the bankers are concerned, we would have no problem.

I particularly liked in your statement, too, the distinction you made between the injury resulting from the "pattern," as opposed to the injury resulting from the "predicate offenses." That is a very important distinction that I think may have been missed by a lot of other commentators. But we feel, while we are not proposing any specific legislation today, we certainly do support your approach, and we would be willing to work with the committee on any other possibility, as well.

Senator Hatch. Thank you.

Mr. Groves?

Mr. Groves. As Congressman Boucher said earlier, that would probably cover a very high percentage of the cases, so I agree with your comment there.

Senator Hatch. And it would still leave the law open——

Mr. Groves. It would still leave some. I have not personally had a chance to. I have been traveling the last 2 days and just learned about it this morning from your opening statement, which I found very informative and very encouraging. So we would be glad to work with your staff, also, in the same way you indicated you would work with Congressman Boucher's staff.

We have testified, we like the straightforwardness of the criminal convictions, but we are certainly willing to work on other ways, too.

Senator Hatch. But you can also see the criticisms of that that I have raised.

Mr. Groves. Yes. I heard you this morning.

Senator Hatch. If that person is not convicted, but is a racketeer, there ought to be some way of bringing a civil action against that person.

Mr. Barreaux. One important fact that I think the committee should bear in mind is that in the entire 15-year history of the bill, we are unable to find one instance where somebody has actually filed a civil against an organized crime figure where there has not been a previous conviction.

Senator Hatch. I see. Well, now, as I view the ABA report, they indicated that only 9 percent of all of these civil RICO cases have really involved traditional racketeering. Is that your contention, as well? It is a very small percentage of the total number of——

Mr. Barreaux. I would have to go back and look at that.

Senator Hatch. All right. Do you agree, Mr. Groves, that a huge portion of the difficulties which you have cited today would be remedied by removing the mail, wire, securities fraud as exclusive predicates for civil RICO actions?

Mr. Groves. Yes.

Senator **Hatch**. All right. Now, the *Sedima* case held, among other things, that RICO does not require a plaintiff to prove a racketeering injury to his competitive, investment, or other business interests, in addition to the harm caused by the predicate violation. What benefits do you foresee in overturning this ruling and requiring a plaintiff to show specifically what damage to his business has been caused by the infiltration or the unfair competition from organized crime—and would not this aspect of S. 1521 solve any problems left unresolved by the limit on wire, mail, and securities fraud cases?

Mr. **Groves**. I wonder if I might ask my counsel, who is a bit more on the technical side of that than I am?

Senator **Hatch**. Sure.

Mr. **Groves**. Eric, could you comment on that?

Mr. **Holtman**. Well, Senator, carving out the three provisions that you did—mail, wire, and securities—I think that goes a step toward it. But also, you have to show that there would be separate racketeering injury of the definition. And I think with your bill, you would still have to show a prior conviction, in effect, twin the two together, in order to plead a case. That has been one of the problems, that the courts that have looked at this have imagined a pleading by civil litigators have been able to entwine the predicate acts with the separate racketeering injury, and that is one of the problems that the court had, trying to find—particularly the second circuit. And I think your bill goes a long way toward that, but I am not sure whether that is still a problem for a lot of courts, to try to find that racketeering economic injury.

Senator **Hatch**. Well, I want to thank you all for your testimony. I think something has to be done here. I even have trouble with the term, securities fraud, where there is no intention to commit fraud, because the word fraud is a very vile epithet, and sometimes, securities fraud is a simple thing such as an error or omission in a security statement or a security filing, and that can happen to anybody, and in retrospect, it does happen to a lot of people. And to be called a defrauder because of a mistake in law or a mistake in accounting, it seems to me, is a little bit harsh. Nevertheless, that has been the case since the original act, but I still think that that alone causes a lot of people a lot of distress, because I think almost all businesses do not want to commit fraud; I mean, that is not their intent. But there are mistakes made, and in retrospect, you can always find something that should have been written in any prospectus, that you can say is an error or omission.

Mr. **Holtman**. Well, Senator, I would point out that one of the predicate crimes that is a major concern for the insurance industry, which is not represented here today, is the arson fraud kind of thing, where there is an arson act committed, and then there is a fraudulent claim filed. So again, that is a question of combining two separate predicate acts and whether the combination of the two constitutes racketeering influence.

Senator **Hatch**. I suppose as long as we have lawyers, we will be finding ingenious ways to expand these statutes. But this one has been expanded really beyond what the intent of Congress was, and I think what we should do is modify it and refine it, without taking away the right of true RICO civil suits, which I think will be more used in the future than in the past, even though you cited the instances now that people realize they can sue true racketeers who have influenced or hurt businesses in our country.

So I want to thank each of you for your testimony; it has been very interesting.

Thank you, Mr. Chairman.

The **CHAIRMAN**. I want to thank you gentlemen for your appearance here today, and I am sure you have added a great deal to this hearing.

At this point, I would like to say that Senator McConnell of Kentucky was here, but was needed in the Agriculture Committee, where they are marking up the farm bill, so at this time, if there is no objection, I will put a statement by him in the record.

[The statement follows:]

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Mr. Chairman, I appreciate once again the opportunity to be here today to examine the extent to which the civil provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") should be modified. This hearing is an appropriate follow up on the hearing that was held in May, for I think it is fair to say that over the past few years few provisions of the civil statutes related to federally created causes of action have engendered as much criticism or have generated as much comment.

Much of the commentary, as well as the judicial opinions, deals with the substance of the original congressional intent. Perhaps Congress never intended to extend the civil provisions to the ordinary civil fraud cases or other matters in which the Commission of two or more distinct acts is now considered a pattern of racketeering activity, with all that that connotes. On the other hand, the language of the statute is clear, and the results of its application to civil fraud cannot be said to be uniformly undesirable.

It is interesting that at a time when this committee is considering whether and to what extent, if any, the civil provisions should be trimmed, a wide variety of bills have been introduced that would further extend the provisions of the act to offenses such as parental kidnapping, child abuse, and the like. So it is indeed timely that we should give consideration to the wisdom of the act in general, for it will, in addition, give us greater understanding of the extent to which the act is suitable to those offenses.

I'm looking forward to reviewing the testimony of the witnesses, and thank you, Mr. Chairman, for calling the hearing.

The **CHAIRMAN**. Our next panel will include: the Honorable David B. Frohnmayer, attorney general, State of Oregon; the Honorable Steven J. Twist, chief assistant attorney general, Office of the Attorney General, Phoenix, AR; Prof. G. Robert Blakey, Notre Dame Law School, South Bend, IN; the Honorable Stephen D. Neely, county attorney, Pima County, AZ; and Mr. Philip A. Feigin, assistant securities commissioner, Colorado Division of Securities.

I have another commitment at this time, and I am going to ask the distinguished Senator from Utah if he will take the Chair.

Senator **HATCH** (presiding). We will begin with the Honorable David B. Frohnmayer, the attorney general of the State of Oregon.

STATEMENT OF A PANEL, INCLUDING HON. DAVID B. FROHNMAYER, ATTORNEY GENERAL, STATE OF OREGON; HON. STEVEN J. TWIST, CHIEF ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, PHOENIX, AZ; PROF. G. ROBERT BLAKEY, NOTRE DAME LAW SCHOOL, SOUTH BEND, IN; HON. STEPHEN D. NEELY, COUNTY ATTORNEY, PIMA COUNTY, TUCSON, AZ; AND PHILIP A. FEIGIN, ASSISTANT SECURITIES COMMISSIONER, COLORADO DIVISION OF SECURITIES

Mr. **Frohnmayer**. Thank you, Mr. Chairman and members of the committee.

I appreciate the chance to appear before this committee. I speak today on behalf of the National Association of Attorneys General. The gentlemen who accompany me speak on behalf of the National District Attorneys' Association. We have a securities commissioner, who will speak on behalf of the concerns of that industry, and we have with us probably the single most knowledgeable person on RICO laws, Prof. G. Robert Blakey, the O'Neill Professor of Law at Notre Dame, who was intimately involved in the draftsmanship of the original RICO Act.

Mr. Chairman and members of the committee, you are well aware of the history of the Federal act, but the committee may be less familiar now with parallel actions taken in State legislatures which have now resulted in the enactment of some 23 little RICO acts around the Nation, the most recent of which is just weeks old, in Iowa.

Even in a State such as Oregon, which is small by national standards in population, we have now recovered more than $1 million, not merely in judgments, but in actual cash returned to the State and various of its funds from illegal racketeering enterprises attacked under the RICO statute.

That raises the first point I would like to leave with this committee this morning, and that is that it is a mistake to assume that either the Federal or State RICO acts are or were passed exclusively to deal with traditional organized crime in the stereotype sense. We have cracked down on and received recoveries from used car odometer rollback operations. We have received recoveries from securities frauds, from offshore banking schemes that victimized Oregon investors; from illegal gambling enterprises; from outrageous debt collectors who used tactics that were unconscionable, and from consumer frauds, which have spanned most of the Western States. In none of those cases, virtually all of which have gone to judgment, was a traditional Mafia godfather-type figure involved. They were, however, classic racketeering schemes which victimized our fellow citizens.

We urge this committee to continue its endorsement of the broad understanding of racketeering activity and injury that are essential to the 1970 Federal act.

The second general statement that we urge to this committee is that by no means should it seek to weaken the civil use of RICO. In the case of my office, every single claim that we have brought under the State RICO Act has been a civil claim. District attorneys have brought some criminal RICO actions, but on a ratio of 7-to-1 in the State of Oregon, the use of civil RICO is the predominant and most effective form in which we use that statute to protect our citizens to prevent injury to people from racketeering activity.

We believe, as Senator Hatch's own colloquy with the distinguished Congressman from Virginia has demonstrated, that imposition of a requirement that there be a prior criminal conviction would be a serious mistake and would be a crippling blow to the use of civil RICO. That is not only true because of the examples that Senator Hatch brought before the committee in his colloquy with the Representative, but also, it would make the initiation of civil RICO tied inevitably to the number and amount of public resources devoted to criminal prosecution of RICO by the U.S. attorney's office and by the U. S. Justice Department.

I do not think there is a single member of this committee of any political persuasion who would believe, for example, that enforcement of private actions under the Sherman Act to prevent conspiratorial injury in antitrust actions, or that violations of the securities laws of this country should be predicated on or limited by the U.S. Government's prior successful conclusion of a criminal antitrust action. That would defeat the entire private attorney general approach embodied in our antitrust statutes and in our securities acts. We would hope that this committee would not wish that utter by restrictive consequence for RICO actions.

Our association opposes the notion that certain offenses should be eliminated from RICO, and this is probably the major point I would like to leave with this committee this morning. That is, examples have been given—unfortunately, not enough specific examples—but allegations have been made that civil RICO is used improperly and excessively. Very few specific factual statements were made to this committee concerning which industry, when, and under what circumstances.

But even assuming the accusation to be well-founded the remedy is not to attack the underlying substantive provisions of RICO. The remedy is to attack the frivolous use of RICO when it is used for vexatious purposes and when it cannot be backed by evidence.

In our master submission to this committee, we suggest to the committee that if there is a concern about the frivolous use of RICO, that that concern be addressed by penalizing people by the award of treble costs, including attorneys fees if they improperly attach vexatious and unfounded RICO claims. Language to that effect is included in one of the exhibits to our testimony this morning. We believe that the remedy to any perceived excess or abuse is to target the excess or abuse and not to gut the underlying value of allowing private citizens to recover for injuries that they have suffered.

Mr. Chairman and members of the committee, the balance of my statement is submitted for the record, and I hope it will be introduced. Let me just leave the committee with this final thought.

In the State of Oregon, powerful interests also have sought exemption from RICO on the basis that it was being improperly used against their industry. To that particular industry—in this case, the video gaming industry on which we have been part of numerous crackdowns around the State, we said something simple. We said if there are no illegal payoffs in violation of the State's gambling laws, there will be no RICO action. We still believe that that is the soundest attitude to take. My letter to the Oregon legislature, which is attached to my testimony, was successful in persuading that body not to eliminate the important enforcement tool on the behest of any particular industry, but rather to target the law to those abuses that exist; when those abuses do not exist, there is no necessity for the law to be enforced.

Sentor HATCH. Thank you, Mr. Frohnmayer. I appreciate you being brief, and we will, of course, put all statements in the record.

[The statement follows:]

Statement of Dave Frohnmayer

Attorney General of Oregon

(Representing the National Association of Attorneys General)

July 30, 1985

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you on behalf of the National Association of Attorneys General to discuss RICO, and in particular the civil provisions of the RICO Act. I appear today with Steve Neeley, County Attorney of Pima County, Tuscon, Arizona (who is appearing on behalf of the National District Attorneys Association), Steve Twist, Chief Assistant Attorney General of Arizona, and G. Robert Blakey, the O'Neil Professor of Law at Notre Dame Law School, who was involved in the enactment of the original federal RICO Act and who is renowned for his knowledge and experience in RICO-related matters.

In the 15 years since Congress originally enacted the federal RICO Act, some 23 states have adopted similar legislation. (Ohio's statute was enacted within the last few days.) The concepts embodied in the federal law and these state statutes have emerged as a vital joint federal/state interest. I appreciate the opportunity to testify today in response to the Chairman's questions concerning civil RICO which were raised in early January of this year, and to present to you the joint statement of the National Association of Attorneys General and the National District Attorneys Association which specifically addresses those questions. I would like briefly to discuss with you the RICO experience we have had in Oregon. Our experience relates to matters you are considering. County Attorney Neeley will then discuss the position of the nation's district attorneys, Assistant Attorney General Twist will relate Arizona's RICO experience, and Professor Blakey will comment and summarize.

Oregon has had a limited but exciting experience with RICO. We have secured record-breaking forfeitures and have eliminated long troublesome vice-related criminal activity through the use of civil provisions of RICO. Our net recoveries from a variety of illegal enterprises exceed a million dollars in a period of just three years. Local prosecutors have obtained criminal convictions in business fraud situations. These convictions would probably not have been possible if not for RICO. (A more detailed account of Oregon's experience has been included in Exhibit I, attached to the NAAG statement.)

Because of these rewarding results, common now in a number of jurisdictions, the National Association of Attorneys General is genuinely concerned about alterations to RICO's basic concepts. The association is here today to oppose any efforts to weaken RICO, but to support strongly any efforts to clarify and strengthen RICO and the concepts embodied within it.

The association opposes any effort to exclude criminal fraud from RICO. We share the committee's concern about frivolous lawsuits but believe that the remedy for this potential problem is not to weaken RICO but rather to add language penalizing RICO's frivolous use. Suggested languge establishing a treble damages cause of action for those subjected to a frivolous suit is included in Exhibit G attached to the statement of the association. We oppose the addition of an "organized crime" limitation to RICO. "Organized crime" is impossible to define and such a requirement would place an extraordinary and unprecedented burden on not only the private civil plaintiff but on the government.

We oppose the addition of a criminal conviction limitation on RICO for it would drastically curtail RICO's civil cause of action and its many benefits. In Oregon the civil cause of action has been remarkably successful. There are seven times more civil cases filed in our jurisdiction than criminal cases. Assistant Attorney General Twist and Professor Blakey possess a wealth of information with which to elaborate on this point.

We oppose a higher burden of proof for private civil plaintiffs. We believe the proof burden is proper and appropriate as presently constituted.

The association specifically supports any efforts to clarify RICO to guarantee that private civil plaintiffs will be able to secure full equity relief and to make more specific the offenses incorporated in RICO. We support the inclusion of additional appropriate offenses, especially in light of recent comprehensive congressional legislation. Exhibit G accompanying the statement of the association provides detail concerning this point.

Strong laws will always attract opposition from interests opposed to their enforcement. In Oregon, portions of the video gaming industry attempted unsuccessfully to secure a legislative exemption from RICO. My letter in opposition (attached) tells its own story. We urge this Congress to observe the same restraint.

Civil RICO is vital to organized crime and white collar crime control efforts, and the National Association of Attorneys General and I urge caution and moderation in any modification of its basic concepts.

DAVE FROHNMAYER
ATTORNEY GENERAL
[illegible]

WILLIAM F. GARY
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

June 3, 1985

The Honorable Wayne Fawbush
State Representative
H478 State Capitol
Salem, Oregon 97310

Re: HB 2303

Dear Representative Fawbush:

As you requested, we are restating formally our strong objections to section 11 of HB 2303. That section would eliminate use of the state's Racketeer Influenced and Corrupt Organizations (RICO) Act in cases where owners or lessees of video gaming equipment have engaged in illegal gambling. There is no justification for this exception.

1. Investigations by local law enforcement and by this office have revealed patterns of widespread, lucrative, untaxed and illegal payoffs with these machines.

2. The Department of Juscice has been successful in securing court relief in every single completed case involving these illegal practices. The result has been substantial. Fines and forefeitures have been received for the benefit of the state and local law enforcement.

3. We do not bring frivolous actions under RICO. The time and expense is justified only where a significant pattern and practice of racketeering exists. That remains our enforcement policy.

4. Without RICO, local law enforcement authorities might have little incentive to crack down on offenders because of the low crime classification and the consequent difficulty of obtaining prosecution. This is typical of the problem with racketeering enterprises generally and was one of the reasons RICO was enacted.

5. We have repeatedly told proponents of this legislation that there is a simple cure for their perceived fear of RICO: If there are no payoffs or other illegal activities, there will be no RICO action.

If you have further questions, please do not hesitate to contact me.

Yours very truly,

Dave

DAVE FROHNMAYER
Attorney General

DF/js
cc: Senator Mike Thorne
Representative John Schoon

Sentor HATCH (presiding). We will now turn to the Honorable Steven J. Twist, chief assistant attorney general in the office of the attorney general in Phoenix, AZ.

Mr. TWIST. Thank you very much, Mr. Chairman. I also appreciate the opportunity to appear and testify and your including my formal statement in the record.

Mr. Chairman, there have been two strong strains of policy that have been carried forward through the legislation that has been reported out of this committee on a variety of criminal justice issues. Those include the need for strong Federal crime control laws and the need for the law to protect the rights of innocent victims and afford them adequate remedies. Both of those strains of policy are no less true when applied to the problem of fraud in America than with any other violent crime that you might pick.

RICO stands at the very center of this country's effort to deal with and control the problem of criminal organized enterprise fraud. It is the single best weapon yet developed to preserve and protect the integrity and honesty of our free market, a market which is today clearly threatened.

The numbers, the financial dimension, are reported to you in Professor Blakey's testimony and need not be repeated again, but they approach what can only be described as Carl Sagan dimensions, in the billions and billions of dollars—certainly, much more of a threat to the free market in this country than any other criminal problem you can pick.

There is a deeper meaning to the dollar figures, though, than just represented by the sheer numbers, and that is the loss of confidence in the integrity and honesty of the marketplace. That loss of confidence hurts every business in America. It is occasioned by reports of massive fraud which inevitably and recurringly lead to calls for greater Government involvement in the regulation of the market, less competition, more concentration, less purchasing and less investment.

So I think it is appropriate that you pick civil RICO as the focus of the hearing, because I hope that when the committee concludes its hearing and when all the testimony is in, you will conclude, perhaps contrary to first impression, that civil RICO, and importantly, private civil RICO, is the best remedy and the best strategy that we can continue to keep our marketplace open and competitive and honest. With a strong Federal RICO and the State RICO's now enacted or being considered around the country, the Federal Government, the States, and the legitimate business community can forge a powerful alliance for integrity in the marketplace, much like an earlier generation forged an alliance for competition and openness with the antitrust laws. Without such an alliance, which must include the private market, we will not begin to control the problem of fraud which confronts this country.

Arizona has had a strong State RICO, including a private right of action, since 1978. It was enacted against a backdrop of the national disgrace of crime problems which confronted our State.

Yesterday, on a tour of the FBI Building with my wife and oldest son, Erik, we came to the display on white collar crime at the FBI. There is a picture which depicts the problem of land fraud in this country, and it shows a picture of the Arizona desert—not a happy memorial to the State of Arizona contained in the FBI Building, and yet so true during the late sixties and early seventies. The problem of fraud in the sale of Arizona land and the investment in Arizona land was a problem of international dimensions with international victims.

It was against this backdrop that the legislature in Arizona moved and, among other things, enacted a strong RICO statute. We have since been able to turn the corner somewhat on the problems of land fraud in Arizona, and are now dealing with the RICO statute in problems of securities fraud and other kinds of investment scams that have not only beset the citizens of Arizona, but also the citizens of this country.

A good test of the judicial reception to the civil cause of action in Arizona is one quote that I would like to share with you before I conclude, from the Arizona Supreme Court. It is best descriptive of what the judicial reaction is:

> There is a moral imperative to provide redress for those injured. Further, when out-of-state investors are swindled by Arizona enterprises, the reputations and businesses of the majority of honest business people within the State are harmed. That this State is willing to provide aid in redressing these wrongs is evidence that the State is serious in its fight to eradicate organized crime. This evidence may instill confidence in nonresidents seeking to invest in the legitimate business of this state.

Arizona's RICO statute was conceived originally and intended to be probusiness. It is the probusiness and provictim thrusts of civil RICO in Arizona which are particularly significant to this committee in light of our statute's breadth. Arizona is one of several States that has no "pattern" requirement at all. It encompasses a lengthy list of "predicate offenses," including a fraudulent scheme statute modeled on the mail fraud statute, but without the requirement of the mailing. It includes securities fraud, sale of unregistered securities, sale of unregistered securities or securities by unregistered dealers or salesmen. It includes a theft statute, a forgery statute, a fraud against the Government statute, and a new money laundering "predicate" offense.

Concern has been expressed about the use of RICO in garden-variety fraud cases. In Arizona, our RICO statute covers garden-variety fraud like a dark cloud, and with good reason, because of the history that we have had in our State. We have had an active program. We have now recovered under civil RICO in excess of $33 million in judgments, in white collar cases as well as traditional organized crime cases. In fact, the use has been more active in civil white collar cases than in others.

Mr. Chairman, just to conclude, RICO is a tremendous force for social justice. Its effectiveness is vastly increased, and its deterrence is vastly increased by its availability to private plaintiffs seeking redress for unlawful conduct. Abuse of RICO, though not different from or greater than abuse of other causes of action, is a matter for the legislature to consider. But measures to prevent the abuse must be directed to the causes of abuse, not at protecting the perpetrators whose conduct necessitates RICO in the first instance. We all recognize that Government will never have the resources or ability to fully protect its citizens from violent crime or fraud, nor would we support a Government that had the ability to completely do that. Even now, we spend very little on this most important function of Government. In Arizona, it is less than a dime out of every dollar taken from the taxpayers for the entire criminal justice system. We simply cannot do the job, in Government, completely to provide protection for the citizens. We must not take from them their only effective recourse for protection against fraud and racketeering, and at the same time, acknowledge our own inability to protect them. To do so would be to subject a predictably large number of Americans to victimization without remedy.

To retreat now from the full force of RICO would be an act of great irresponsibility; would signal a new era of uncontrolled fraud, and would break faith with the American people who have been promised and who deserve the best weapons available to fight racketeering and preserve our free market.

Mr. Chairman, thank you for the opportunity to present these views, and I will be happy to answer any questions.

Senator HATCH. Thank you so much.

[The statement follows:]

Attorney General
1275 WEST WASHINGTON
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Robert K. Corbin

STATEMENT

OF

STEVEN J. TWIST
CHIEF ASSISTANT ATTORNEY GENERAL
STATE OF ARIZONA

ON BEHALF OF

ARIZONA ATTORNEY GENERAL BOB CORBIN

AND THE

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. Chairman and Members of the Committee, my name is Steve Twist. I am the Chief Assistant Attorney General for the State of Arizona and responsible to the Attorney General for the work of the 190 lawyers in our office. I directly supervise the civil and criminal state RICO enforcement effort for Arizona. I serve on the American Bar Association's RICO Cases Committee and helped draft the Report of the Committee recently published by the ABA. I helped organize and serve on the National Association of Attorneys General RICO subcommittee and its RICO Working Group which is just organizing as an association of state RICO prosecutors for the exchange of case information and intelligence for a nationally coordinated state effort.

I am honored to have been invited to join your panel of witnesses today and testify on behalf of Arizona Attorney General Bob Corbin and the National Association of Attorneys General on RICO and the various proposals now being discussed to amend it.

First Mr. Chairman, I would like to express the appreciation and respect that state and local prosecutors have for your leadership in enacting stronger federal criminal statutes. Despite recent gains, the threat of crime which faces our country continues to be so severe that local law enforcement recognizes the clear need for the federal government to be a full partner in all efforts to control it. The recent amendments to the federal criminal code will aid immeasurably in our efforts to control crime. With the legislation's emphasis on the rights of victims there is also a long-awaited recognition that law-abiding citizens have rights and deserve remedies in the operation of our criminal justice system.

Mr. Chairman, members, these positions, so effectively promoted by this committee in recent legislation, namely the need for strong federal crime control laws and the need for the law to protect the rights of innocent victims and afford them adequate remedies, are no less true when applied to the threat of criminal fraud, and other forms of organized crime and racketeering which threaten our free market. And RICO stands at the very center of this country's efforts to control criminal, organized fraud; it is the single best weapon yet developed to preserve and protect the integrity and honesty of our free market.

Today that market is clearly threatened. The dollar amounts of loss due to fraud have been reported to you in Professor Blakey's testimony and approach Carl Sagan dimensions. Our experience in Arizona parallels, and in the not too recent past has paced, the national trend. Each of us in countless ways, direct and hidden, pay for this theft.

But I also believe there is a deeper meaning to the dollar losses. They signal a loss of critical confidence in the market as well; a confidence vital to healthy competition and the preservation of a free economy. This loss of confidence occasioned by reports of massive fraud inevitably and recurringly leads to calls for greater government regulation of the market, less competition, more concentration, and less investment and purchasing.

Against this backdrop, Mr. Chairman, it is particularly appropriate that you have asked a series of questions which direct the focus of these hearings to civil RICO and to the private right of action in particular. We trust that after all the testimony is given and all the evidence is in, the committee will conclude, perhaps contrary to first impression, that private civil RICO is and must remain a key element in this country's strategy to keep its markets open, competitive, and honest. And for that contribution the Congress can be proud.

With a strong federal RICO, and the state RICOs now enacted or being considered by states all across America, the federal government, the states, and the legitimate business community can forge a powerful alliance for integrity in the market, even as an earlier generation of Americans forged, with the antitrust laws, a similar public/private alliance to ensure open competition in the market. Without such an alliance, which must include the private market, we will not begin to control the fraud which threatens us.

Arizona has had a state RICO statute, with a strong private civil right of action, since October of 1978. It was enacted by the legislature as part of a major criminal code revision that brought Arizona from territorial days into the forefront of states with effective criminal laws. The legislature was moved to action as the attention of the state was riveted on the severe threat of crime, both violent crime and fraud, which had become Arizona's national disgrace. In 1978, we had the second highest crime rate in America. In the years just before that our real estate markets had been corrupted by land frauds of international dimensions, we witnessed the fraud-caused failure of a major thrift institution and the car-bomb murder of Don Bolles, an investigative reporter attempting to expose organized crime in our state. The people demanded action and the legislature answered with the establishment of a state grand jury, a tough new criminal code with determinate, presumptive sentencing, and the RICO statutes, among many other reforms. Since that time

Arizona has taken a leadership role in the use of RICO, and civil RICO in particular, in its efforts to control criminal fraud and other enterprise crime.

The essence of RICO is its realistic view of antisocial behavior. It recognizes that crime gains force and effect when done by or through "enterprises," a term that fits criminal groups and economic units much better than conspiracy. It also recognizes the economic aspects of crime; that economic resources are a part of the capability of people to commit crime, that economic motives are important to the leaders, planners and advisors of criminal groups and projects, and that crime has economic effects on society beyond its direct victims.

The enterprise concept and the economic sanctions of RICO have provided the tools for very powerful and effective criminal prosecutions at the federal level. Never before have so many major organized criminal groups been so effectively neutralized across the country. Even more promising, these cases have accelerated continuously; the benefits of criminal RICO are only now beginning to be felt.

The Arizona experience with criminal RICO prosecution is comparable to the federal experience, except that Arizona prosecutors began to use RICO more rapidly after its 1978 enactment. Arizona racketeering prosecutions have been most numerous in the areas of fraud, narcotics trafficking, and traditional rackets such as prostitution, automotive "chop shops", fencing, gambling, and loansharking. Last year Arizona's most active leader of organized crime, Joseph Frank Tocco, older brother of Chicago's Albert Caesar Tocco, was sentenced to twenty years in prison in a RICO prosecution. Other states have had similar success.

The courts, federal and state, have had little problem applying criminal RICO. Its enterprise concept is evolving in an orderly and responsible fashion with few exceptions. Criminal RICO is an unqualified success, and a uniquely effective law enforcement tool.

However, in the long run it will be civil RICO that will become the cornerstone of our fight against enterprise crime. Civil RICO defines unlawful conduct in ways that conform to economic realities and prescribes economic remedies; it recognizes the effect of criminally misused economic power, the economic motives of criminal leaders, and the economic harm caused by crime. And it applies economic sanctions to attack the structure of enterprise crime. The logical center of RICO is therefore civil RICO.

Some view RICO as revolutionary. While it may occasion a major, perhaps historic, advancement in our ability to deal with sophisticated enterprise crime, in truth it is part of the natural growth and evolution of Anglo-American law; its fundamental principles are firmly rooted in our legal traditions. Causes of action for so-called statutory torts have been evolving for hundreds of years. RICO is simply a milestone on the road we have been traveling for a long time.

So too with the recognition of victims' rights and interests. Just three years ago, twelve years after RICO, Congress passed the Victim and Witness Protection Act of 1982, continuing the process by providing a regular method of victim restitution in federal courts and legislating collateral estoppel in all private civil cases based on federal criminal judgments. RICO is a part of a very long trend toward economic justice for victims of crime.

In Arizona civil RICO was designed to be and is considered to be pro-business by origin and intent. Our Supreme Court has said, in a securities fraud civil RICO case in which it found no "organized crime" nexus necessary under our statute, that:

> There is a moral imperative to provide redress for those injured. Further, when out-of-state investors are swindled by Arizona enterprises, the reputations and businesses of the majority of honest business people within the state are harmed. That this state is willing to provide aid in redressing these wrongs is evidence that the state is serious in its fight to eradicate organized crime. This evidence may instill confidence in non-residents seeking to invest in the legitimate business of this state.
> State ex rel. Corbin v. Pickrell, 136 Ariz. 589, 597, 667 P.2d 1304, 1312 (1983)

This endorsement of the pro-business and pro-victim thrusts of civil RICO in Arizona is particularly significant to this Committee in light of our statute's breadth. Arizona is one of several states that has no pattern requirement at all. It encompasses a lengthy list of predicate offenses, including a fraudulent scheme statute modeled on federal mail fraud. It includes securities fraud, sale of unregistered securities, sale of securities by unregistered dealers or salesmen, a unified theft statute, forgery, the use of falsehoods to defraud or deceive in matters relating to government agencies, and a new money laundering predicate offense. Arizona covers "garden variety fraud" like a dark cloud.

Arizona and other states with active programs using civil RICO have found it to be a very effective tool. Arizona has obtained judgments totalling $33,217,661.42 in the four years that it has had a prosecutorial unit dedicated to civil RICO enforcement. These cases have included fraud by a mortgage company, securities fraud, tax shelter investment fraud, embezzlement and various fraudulent schemes. They have also included traditional organized crime cases, such as drug dealing, loan sharking, extortion, automobile "chop shops", fencing, insurance fraud, gambling and prostitution.

Civil RICO cases have succeeded in controlling major criminal networks where the entire range of remedies previously available had failed. In one case the entire massage parlor industry of metropolitan Phoenix, consisting of dozens of separate but inter-related massage parlors, was dismantled.

State v. Buckner, et al., filed in July, 1981, alleged an enterprise composed of dozens of massage parlor operators and their professional advisors engaged in a combination of parlors conducted through prostitution, sale of drugs, trafficking in stolen property and other offenses, insulated by acts of obstruction of justice. The civil case was filed after criminal drug and prostitution charges had been brought against many of the upper echelon operators.

The Buckner case demonstrates the unique effectiveness of civil RICO in dismantling ongoing vice cartels. The massage parlor-based prostitution/drug/stolen property industry had been entrenched in the Phoenix area. It served as an organizational framework for a dangerous level of outlaw motorcycle members, a dispensation network for drugs and stolen property, and a brokerage for all kinds of criminal opportunities, from robbery to homicide. It had legal, accounting and real estate advisors, and had withstood an IRS investigation, a federal grand jury, vigorous bawdy house abatement actions, zoning actions and numerous criminal prosecutions. Local wags said that the Valley of the Sun had more massage parlors than convenience markets. Then came civil RICO.

The civil approach destroyed the industry, drove prostitution into forms that do not support other crimes, and made its reappearance impossible because of the mass of testimony and evidence gathered for the case. Secondarily, it generated new criminal charges by developing additional witnesses, and secured financial remedies for the state.

The methods of the Buckner case are useful in similar cases. Vice enterprises depend on their large influx of easy money to attract inside participants. Removal of a person does not disrupt the flow of money, so loyalty to the industry remains. Interruption of the money flow disorganizes the enterprise, or even the entire local industry. The balance of persuasion shifts radically in favor of cooperation with law enforcement. Testimony of insiders can then be immediately preserved. The two key elements of a vice enterprise, money flow and loyalty of insiders, are uniquely susceptible to civil procedure.

A similar result has been achieved in the automobile fencing industry. Arizona was once an expansion area for Chicago-based "chop shop" operators. Our recovery rate on stolen cars dropped dramatically due to these operators, with a corresponding rise in insurance rates. The shops have been closed, the property confiscated, and the operators that have not been jailed have left Arizona.

Similarly, civil RICO has proven to be extremely effective in dealing with traditional organized crime groups.

State v. Tocco, et al., filed in October, 1982, alleged an enterprise of persons engaged in various criminal activities, including loansharking, prostitution, and property crimes, including theft, robbery, and insurance fraud, all insulated by a wall of silence enforced by armed violence. Joseph Tocco, the defendant in this case, as I mentioned, is the brother of Albert Tocco, the south suburban boss of the Chicago syndicate. The common feature was the coordination, advice, financing and material assistance of Tocco, as in United States v. Elliott, 571 F.2d 880 (5th Cir.) cert. denied, 99 S.Ct. 349 (1978).

The ongoing civil case has achieved results not possible in the criminal environment. It has resulted in a judgment of $273,000 for victims, forfeiture of the headquarters of the group, a liquor store/bar/nude modeling studio owned by Tocco and worth over $250,000 net, and orders of payment of prosecution and investigation costs. More important, the case has utterly dissolved the Tocco group. Of the 21 individuals sued as co-defendants of Tocco, thirteen are out of Arizona. Of those remaining in Arizona, two are in prison, two are on parole or probation, and one has become a state's witness, for a total of eighteen. None of the remaining three have current connections with each other. Of the thirteen out of Arizona, one is in prison, five are fugitives, and several have given evidence to the state. The Tocco organization had operated in Phoenix for twelve years providing money, material, expert manpower and planning for rackets and for particular criminal opportunities. It has been scattered, deprived of resources, and utterly discredited and stripped of its reputation as a group capable of shielding its members from law enforcement.

There is no question that civil RICO creates a hostile environment for traditional organized crime.

But we have not been alone in our use of RICO. Arizona Bank; Connecticut Mutual Life Ins. Co.; Diners Club, Inc.; Chase Manhattan Financial Services; Walter Heller Corporation; John F. Long; Motorola, Inc.; Wells Fargo Credit Corp.; and Southern Pacific Conversation Co., (Sprint) have all been plaintiffs in Arizona Superior Courts using the state RICO act. These are only a few of the corporations in Arizona who have recognized the benefits of RICO for remedying fraud in the marketplace.

In a very real sense, the legislation in Arizona and nationally represents a commitment on the part of our elected officials that integrity and honesty must again become part and parcel of the national marketplace ethic. And in this effort the business community has a very high stake because no community is more victimized by fraud than business itself. Victimized not only through enormous direct losses but also through the eroded and shaken public confidence in the marketplace.

We do, however, recognize the potential for abuse. Arizona's legislature has taken several initiatives to prevent abuse of private civil RICO cases. In 1982 our legislature required all private RICO plaintiffs to send a copy of their complaint to the Attorney General. It also empowered the Attorney General to intervene in any RICO case and to file amicus briefs. As a result, our Office has a fairly complete file of all private civil RICO cases in Arizona. We do not have to rely on the hyperbole of litigators to evaluate the uses made of RICO and the potential for abuse. We have filed amicus briefs on behalf of both plaintiffs and defendants. We have even defended (successfully) a RICO action.

Moreover, the Arizona Rules of Civil Procedure (like the Federal Rules) provide further protection against abusive suits. Rule 9(b) requires that in all averments of fraud the circumstances constituting fraud must be stated with particularity. Rule 11 provides money sanctions against parties who file groundless, abusive lawsuits. These rules when enforced by the courts provide effective protection against the very abuse now being alleged by RICO's critics. Arizona added an additional protection for all of its citizens in 1985. A.R.S. § 12-349 codified the strong policy of Rule 11, assessing attorneys fees jointly and severally among attorneys and parties abusing legal processes.

I would like to emphasize an important aspect of Arizona's experience. We have had no public outcry against private civil RICO (or against government civil RICO or criminal RICO) in Arizona. Our business community and bar has, of course, examined it and it has been the subject of presentations to continuing legal education seminars and business groups. These have uniformly included Assistant Attorneys General on the faculty or among the speakers. RICO has been responsibly received in Arizona, where its business crime emphasis is much stronger than that of federal RICO.

I attribute this to our legislature's foresight in providing the Attorney General with some leadership role in private civil RICO development and our conscientious pursuit of the orderly and reasonable development of RICO law.

The States are sometimes spoken of as centers of experimentation with techniques and procedures in dealing with social problems. This is definitely true in the RICO area, and this Committee is in a position to benefit from state experience with RICO. Where RICO, and I speak now of private civil RICO, has been given a chance to work, it has worked well.

There is scant evidence that RICO has created baseless litigation in any greater proportion than other causes of action. It is not enough to point to a few lawsuits, even if there are unjustified RICO cases that have been filed. Nor is it enough to question defendants of RICO actions or their attorneys about their feelings. All causes of action are subject to abuse, and no defendant enjoys litigation. The fact remains that extremely few private civil RICO cases have been concluded. As more fully explained by Professor Blakey in his testimony, there is now no empirical data that shows RICO is more abused than an "average" cause of action.

Second, there is what lawyers might call standing to complain. RICO is social reform legislation. It is designed to secure the proceeds of honest labor for its rightful beneficiaries, remove the wherewithal and incentive from criminal enterprises, and restore the faith of the body politic in their government's ability to provide an ordered society in which right is rewarded and wrong is combated. The honest laborers are not complaining. The man on the street sees RICO as a long-overdue attack on crime that pays. Business has no reluctance to sue under RICO. Some small groups would rather not _be_ sued under RICO but it seems the opponents of RICO are overwhelmingly lawyers. I suggest to you that this vocal interest group's words and imagined problems are no substitute for facts or for the interests of the people RICO was designed to serve. The threat to our free market is too great and our obligation to protect that freedom too important to be swayed by these dissenters.

Now, Mr. Chairman, turning to some of the specific proposals being considered. It is well-accepted penal theory that the punishment should fit the crime. In other words, remedial action should be founded on some articulable plan to prevent the recurrence of the problem. None of the "solutions" proposed by RICO's critics are proper remedial action.

The prior criminal conviction proposal is an example of a non-remedy now soundly rejected. There are very few criminal convictions in relation to all of the unlawful acts committed. Those few convictions that are obtained are obtained by prosecutors, who, together with law enforcement agencies, have selected those cases as most worthy of their very limited resources. This selection is based upon discretionary judgment that criminal sanctions, i.e. removal from society, are most appropriate in those cases. The difficult, complex cases tend to be beyond the resources of prosecutors whose offices are buried in violent or street crime cases. The cases in which the defendant would likely receive light criminal sanction, i.e. little or no jail, are deemed less appropriate. The complex, difficult case against the defendant likely to get little jail is doubly unlikely to be prosecuted in most prosecutors' offices. They are the rarest criminal cases although they are often the most appropriate for civil action. The net result of a prior conviction rule, then, would be to exempt the very people who had escaped criminal prosecution because criminal sanctions were seen as less appropriate than civil sanctions, despite the fact that civil sanctions are eminently appropriate.

A prior conviction rule would also lead to unjust civil results in the few cases that would be possible. Frequently all of the culpable parties to a scheme are not prosecuted. This occurs because possible defendants may be in distant jurisdictions, they may plead to lesser offenses, they may become state's witnesses, they may have evidence or statements suppressed, or they may simply escape detection or proof until later. If any such person is a necessary party to the civil action, the action would fail entirely because they could not be sued because they were unconvicted. Similarly, if a clearly culpable "deep pocket" defendant had escaped criminal conviction the action would be rendered useless, regardless of his culpability, or, if the other defendants were found liable in the civil action, they would be unfairly burdened by the absence of their co-conspirator's presence to recompense victims. The same problem recurs in the area of counter-claims and third party complaints and in each instance the victims would suffer further. Justice White, speaking for the United States Supreme Court, put the arguments against imposing a criminal conviction requirement succinctly when he said:

> Finally, we note that a prior conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons--not least among them the possibility that the

> government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. Cf. Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979). This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice. See also n. 9, *supra*.

On another point, the notion that civil RICO should or even could be logically limited to organized crime or mobster type injuries displays a lack of understanding of organized crime and of injuries. Vast fortunes are made by organized criminal groups engaging in bank frauds, investment frauds, bankruptcy and "bust-out" frauds, arson and other insurance frauds, and countless other financial crimes that are indistinguishable from the same offenses done by isolated or first-time offenders. Also, most statutes include a wide variety of behavior within their definitions. Mail fraud is one example, but most statutes are general in application. The courts would be asked to distinguish between persons convicted of the same offense on the basis of the courts' own varied notions of organized crime or mobsters.

Also, the appropriate burden of proof in a civil case is the preponderance of the evidence. This is the burden of proof in all manner of civil causes of action in which the conduct alleged is or could also be criminal. This is so without exception based on the degree of social opprobrium attached to the conduct. The victim of a child molest, the successors of a murdered person, or the victim of virtually any crime may sue and recover on the preponderance of the evidence standard. Defendants in such cases, as a class, are protected from suit by their poverty. RICO has reached a more monied class of criminals. This more monied class seeks legislative protection through a higher standard of proof. A robber or burglar or child molester could still be sued on the preponderance of the evidence, but the executive fence could not.

The justification offered for class discrimination in favor of powerful and well-lobbied criminals is that a RICO suit subjects them to disgrace and could therefore provoke settlements despite weak factual proof of wrongdoing. First, there is no evidence that this has happened. Second, the courts and the bar are well-equipped to prevent or punish abusive pre-trial publicity without regard to the particular cause of action. Third, and more to the point, raising the burden of proof can in no way deter attorneys from filing groundless RICO actions. They are not deterred by the preponderance standard because they do not care whether it is unjustified. The problem is not in the cause of action, it is in its abusers. The solution must therefore affect its abusers.

Conclusion

RICO is a tremendous force for social justice. Its effectiveness is vastly increased by its availability to private plaintiffs seeking redress for unlawful conduct. Abuse of RICO, though not different from or greater than abuse of other causes of action, is a matter for the legislature to consider. Measures to prevent abuse must, however, be directed to the causes of abuse, not at protecting the perpetrators whose conduct necessitates RICO in the first instance.

We all recognize that government will never have the resources or the ability to fully protect its citizens from violent crime or fraud; nor would we support a government that had the ability to do that. Even now we spend very little on this most important function of government. In Arizona, less than 10 cents out of every dollar taken from the taxpayers gets spent on all points of the criminal justice system. We must not take from the citizens their only effective resource for protection against fraud and racketeering and at the same time acknowledge our own inability to protect them. To do so would subject a predictably large number of Americans to victimization without remedy.

To retreat now from the full force of RICO would be an act of great irresponsibility, would signal a new era of uncontrolled fraud, and would break faith with the Arizona people who have been promised and who deserve the best legal weapons available to fight racketeering and preserve and protect our free market..

Mr. Chairman, thank you for the opportunity to present these views; I, of course, would be happy to respond to any questions.

13-105. Definitions

In this title, unless the context otherwise requires:

1. "Act" means a bodily movement.

2. "Benefit" means anything of value or advantage, present or prospective.

3. "Conduct" means an act or omission and its accompanying culpable mental state.

4. "Crime" means a misdemeanor or a felony.

5. "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as those terms are thusly defined:

(a) "Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

(b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

(c) "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense. that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

(d) "Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

6. "Dangerous drug" means dangerous drug as defined by section 13-3401.

7. "Dangerous instrument" means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.

8. "Deadly physical force" means force which is used with the purpose of causing death or serious physical injury or in the manner of its use or intended use is capable of creating a substantial risk of causing death or serious physical injury.

9. "Deadly weapon" means anything designed for lethal use. The term includes a firearm.

10. "Enterprise" includes any corporation, association, labor union or other legal entity.

11. "Felony" means an offense for which a sentence to a term of imprisonment in the custody of the department of corrections is authorized by any law of this state.

12. "Firearm" means any loaded or unloaded pistol, revolver, rifle, shotgun or other weapon which will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition.

13. "Government" means the state, any political subdivision of the state or any department, agency, board, commission, institution or

governmental instrumentality of or within the state or political subdivision.

14. "Government function" means any activity which a public servant is legally authorized to undertake on behalf of a government.

15. "Intoxication" means any mental or physical incapacity resulting from use of drugs, toxic vapors or intoxicating liquors.

16. "Misdemeanor" means an offense for which a sentence to a term of imprisonment other than to the custody of the department of corrections is authorized by any law of this state.

17. "Narcotic drug" means narcotic drugs as defined by section 13-3401.

18. "Offense" OR "PUBLIC OFFENSE" means conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of ~~this~~ THE state IN WHICH IT OCCURRED or by any law, regulation or ordinance of a political subdivision of ~~this~~ THAT state AND, IF THE ACT OCCURRED IN A STATE OTHER THAN THIS STATE, IT WOULD BE SO PUNISHABLE UNDER THE LAWS, REGULATIONS OR ORDINANCES OF THIS STATE OR OF A POLITICAL SUBDIVISION OF THIS STATE IF THE ACT HAD OCCURRED IN THIS STATE.

19. "Omission" means the failure to perform an act as to which a duty of performance is imposed by law.

20. "Peace officer" means any person vested by law with a duty to maintain public order and make arrests.

21. "Person" means a human being and, as the context requires, an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government or a governmental authority.

22. "Petty offense" means an offense for which a sentence of a fine only is authorized by law.

23. "Physical force" means force used upon or directed toward the body of another person and includes confinement, but does not include deadly physical force.

24. "Physical injury" means the impairment of physical condition.

25. "Possess" means knowingly to have physical possession or otherwise to exercise dominion or control over property.

26. "Possession" means a voluntary act if the defendant knowingly exercised dominion or control over property.

27. "Property" means anything of value, tangible or intangible.

28. "Public servant" means any officer or employee of any branch of government, whether elected, appointed or otherwise employed, including a peace officer, and any person participating as advisor, consultant or otherwise in performing a governmental function. The term does not include jurors or witnesses. "Public servant" includes those who have been elected, appointed, employed or designated to become a public servant although not yet occupying that position.

29. "Serious physical injury" includes physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, or serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

30. "Unlawful" means contrary to law or, where the context so requires, not permitted by law.

31. "Vehicle" means a device in, upon or by which any person or property is or may be transported or drawn upon a highway, waterway or airway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

32. "Voluntary act" means a bodily movement performed consciously and as a result of effort and determination.

33. "Voluntary intoxication" means intoxication caused by the knowing use of drugs, toxic vapors or intoxicating liquors by the defendant, the tendency of which to cause intoxication the defendant knows or ought to know, unless the defendant introduces them pursuant to medical advice or under such duress as would afford a defense to an offense.

Sec. 2. Section 13-2301, Arizona Revised Statutes, as amended by Laws 1985, chapter 198, section 1, is amended to read:

13-2301. Definitions

A. For the purposes of sections 13-2302 through 13-2304:

1. "Creditor" means any person making such an extension of credit or any person claiming by, under, or through any person making such an extension of credit.

2. "Debtor" means any person to whom such an extension of credit is made or any person who guarantees the repayment of an extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom an extension is made to repay the same.

3. "Extortionate extension of credit" means any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time such extension is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person.

4. "Extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person.

5. "To collect an extension of credit" means to induce in any way any person to make repayment thereof.

6. "To extend credit" means to make or renew any loan or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or shall be deferred.

7. "Repayment of any extension of credit" means the repayment, satisfaction or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

B. For the purposes of sections 13-2305 through 13-2307:

1. "Dealer in property" means a person who buys and sells property as a business.

2. "Stolen property" means property that has been the subject of any unlawful taking.

3. "Traffic" means to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with intent to sell, transfer, distribute, dispense or otherwise dispose of to another person.

C. For the purposes of section 13-2308:

1. "Combination" means persons who collaborate in carrying on or furthering the activities or purposes of a criminal syndicate even though such persons may not know each other's identity or membership in the combination changes from time to time or one or more members may stand in a wholesaler-retailer or other arm's length relationship with others as to activities or dealings between or among themselves in an illicit operation.

2. "Criminal syndicate" means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing

basis in conduct which violates any one or more provisions of any felony statute of this state.

D. For the purposes of sections 13-2312 through 13-2315, unless the context otherwise requires:

1. "Control", IN RELATION TO AN ENTERPRISE, means the possession of ~~a~~ sufficient ~~interest~~ MEANS to permit substantial direction over the affairs of an enterprise AND, IN RELATION TO PROPERTY, MEANS TO ACQUIRE OR POSSESS.

2. "Enterprise" means any corporation, partnership, association, labor union, or other legal entity or any group of persons associated in fact although not a legal entity.

3. "Financial institution" means any bank, trust company, savings and loan association, credit union, or small money lender under the jurisdiction of the state banking department or an agency of the United States.

4. "Racketeering" means any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

(a) Homicide.
(b) Robbery.
(c) Kidnapping.
(d) Forgery.
(e) Theft.
(f) Bribery.
(g) Gambling.
(h) Usury.
(i) Extortion.
(j) Extortionate extensions of credit.
(k) Dealing in narcotic drugs, marijuana or dangerous drugs.
(l) Trafficking in explosives, weapons or stolen property.
(m) Leading organized crime.
(n) Obstructing or hindering criminal investigations or prosecutions.
(o) Asserting false claims including, but not limited to, false claims asserted through fraud or arson.
(p) False statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands.
(q) Resale of realty with intent to defraud.
(r) Fraud in the purchase or sale of securities.
(s) Sale of unregistered securities or real property securities and transactions involving such securities by unregistered dealers or salesmen.
(t) A scheme or artifice to defraud.
(u) Obscenity.
(v) Child pornography.
(w) Prostitution.
(x) Restraint of trade or commerce in violation of section 34-252.
(y) Terrorism.
(z) MONEY LAUNDERING.

5. "Records" means any book, paper, writing, record, computer program or other material.

E. For the purposes of section 13-2316:

1. "Access" means to approach, instruct, communicate with, store

data in, retrieve data from or otherwise make use of any resources of a computer, computer system or computer network.

2. "Computer" means an electronic device which performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities which are connected or related to such a device in a system or network.

3. "Computer network" means the interconnection of communication lines with a computer through remote terminals or a complex consisting of two or more interconnected computers.

4. "Computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system.

5. "Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer system.

6. "Computer system" means a set of related, connected or unconnected computer equipment, devices and software.

7. "Financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card, marketable security or any other written instrument, as defined by section 13-2001, paragraph 7, which is transferable for value.

8. "Property" means financial instruments. information, including electronically produced data, computer software and programs in either machine or human readable form, and anything of value, tangible or intangible.

9. "Services" includes computer time, data processing and storage functions.

13-2302. Making extortionate extensions of credit; classification

A. Any person who makes an extortionate extension of credit is guilty of a class 5 felony.

B. In any prosecution pursuant to this section, if it is shown that all of the following factors were present in connection with the extension of credit, there is prima facie evidence that the extension of credit was extortionate:

1. The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable at the time the extension of credit was made through civil judicial processes against the debtor in the county within which the debtor, if a natural person, resided or in every county within which the debtor, if other than a natural person, was incorporated, or qualified to do business.

2. The extension of credit was made at a rate of interest in excess of an annual rate of forty-five per cent calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

3. At the time the extension of credit was made, the debtor reasonably believed that either of the following:

(a) One or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment had been punished by extortionate means.

(b) The creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

4. Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars.

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection B, paragraph 1 or 2, and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

13-2303. Financing extortionate extensions of credit

A person who knowingly advances money or property, whether as a gift, loan, investment, pursuant to a partnership or profit sharing agreement or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced, directly or indirectly, for the purpose of making extortionate extensions of credit, is guilty of a class 2 felony.

13-2304. Collection of extensions of credit by extortionate means

A. A person who knowingly participates in any way in the use of any extortionate means to collect or attempt to collect any extensions of credit or to punish any person for the nonrepayment thereof is guilty of a class 4 felony.

B. In any prosecution pursuant to this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment was punished by extortionate means.

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence at the time the extension of credit in question was made of the circumstances described in section 13-2302, subsection B, paragraph 1 or 2, and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

13-2305. Permissible inferences

In an action for trafficking in stolen property:

1. Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.

2. Proof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen.

3. Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business, or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen.

13-2306. Possession of altered property; classification

A. A person who is a dealer in property and recklessly possesses property the permanent identifying features of which, including serial numbers or labels, have been removed or in any fashion altered is guilty of a class 6 felony.

B. It is a defense to a prosecution under this section that a person has lawfully obtained a special serial number pursuant to section 28-320 or lawfully possesses the usual indicia of ownership in addition to mere possession or has obtained the consent of the manufacturer of the property.

13-2307. Trafficking in stolen property; classification

A. A person who recklessly traffics in the property of another that has been stolen is guilty of trafficking in stolen property in the second degree.

B. A person who knowingly initiates, organizes, plans, finances, directs, manages or supervises the theft and trafficking in the property of another that has been stolen is guilty of trafficking in stolen property in the first degree.

C. Trafficking in stolen property in the second degree is a class 3 felony. Trafficking in stolen property in the first degree is a class 2 felony.

13-2308. Leading organized crime; classification

A. A person commits leading organized crime by:

1. Intentionally organizing, managing, directing, supervising or financing a criminal syndicate; or

2. Knowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of a criminal syndicate; or

3. Furnishing advice, assistance or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate; or

4. Intentionally promoting or furthering the criminal objectives of a criminal syndicate by inducing or committing any act or omission by a public servant in violation of his official duty.

B. No person shall be convicted pursuant to this section on the basis of accountability as an accomplice unless he aids or participates in violating this section in one of the ways specified.

C. Leading organized crime is a class 2 felony.

13-2309. Bribery of participants in professional or amateur games, sports, horse races, dog races, contests; classification

Whoever knowingly gives, promises or offers to any professional or amateur baseball, football, hockey, polo, tennis, horse race, dog race or basketball player or boxer or any player or referee or other official who participates or expects to participate in any professional or amateur game or sport, or to any manager, coach or trainer of any team or participant or prospective participant in any such game, contest or sport, any benefit with intent to influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory or defeat, or in the case of a referee or other official to affect his decisions or the performance of his duties in any way, in a baseball, football, hockey or basketball game, boxing, tennis, horse race, dog race, or polo match, or any professional or amateur sport, or game, in which such player or participant or referee or other official is taking part or expects to take part, or has any duty or connection therewith, is guilty of a class 4 felony.

13-2310. Fraudulent schemes and artifices; classification

A. Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.

B. Reliance on the part of any person shall not be a necessary element of the offense described in subsection A of this section.

13-2311. Fraudulent schemes and practices; wilful concealment; classification

A. Notwithstanding any provision of the law to the contrary, in any matter related to the business conducted by any department or agency of this state or any political subdivision thereof, any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony.

B. For the purposes of this section, "agency" includes a public agency as defined by section 38-502, paragraph 6.

13-2312. Illegal control of an enterprise; illegally conducting an enterprise; classification

A. A person commits illegal control of an enterprise if such person, through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.

B. A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering.

C. A knowing violation of this section is a class 3 felony.

13-2313. Judicial powers over racketeering criminal cases

During the pendency of any criminal case charging an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, the superior court may, in addition to its other powers, issue an order pursuant to section 13-2314, subsections B and C. Upon conviction of a person for an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, the superior court may, in addition to its other powers of disposition, issue an order pursuant to section 13-2314.

13-2314. Racketeering; civil remedies; definitions

A. A person who sustains injury to his person, business or property by racketeering as defined by section 13-2301, subsection D, paragraph 4 or by a violation of section 13-2312 may file an action in superior court for the recovery of treble damages and the costs of the suit, including reasonable attorney's fees. The state may file an action in behalf of those persons injured or to prevent, restrain, or remedy racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312.

B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders.

C. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, THE CREATION OF RECEIVERSHIPS AND THE ENFORCEMENT OF CONSTRUCTIVE TRUSTS, in connection with any property or other interest subject to damages, forfeiture or other REMEDIES OR restraints pursuant to this section as the court deems proper.

D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, civil and criminal, ~~incurred by the state or county as appropriate~~ INCLUDING REASONABLE ATTORNEY FEES, to be paid to the general fund of the state or county which brings the action.

6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:

(a) Any property or other interest acquired or maintained by a person in violation of section 13-2312.

(b) Any interest in, security of, claims against or property, OFFICE, TITLE, LICENSE or contractual right of any kind affording a source of influence over any enterprise OR OTHER PROPERTY which a person has

~~established, operated, controlled~~ ACQUIRED OR MAINTAINED AN INTEREST IN OR CONTROL OF, conducted or participated in the conduct of in violation of section 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, PROPERTY and other things of value used or intended to be used to facilitate commission of the offense.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain ~~a person has~~ THAT WAS acquired or maintained through an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 OR A VIOLATION OF SECTION 13-2312 OR THAT ANY PERSON IS LIABLE FOR UNDER THIS SECTION.

E. A PERSON OR ENTERPRISE THAT ACQUIRES ANY PROPERTY THROUGH AN OFFENSE INCLUDED IN THE DEFINITION OF RACKETEERING IN SECTION 13-2301, SUBSECTION D, PARAGRAPH 4 OR THROUGH A VIOLATION OF SECTION 13-2312 IS AN INVOLUNTARY TRUSTEE. THE INVOLUNTARY TRUSTEE AND ANY OTHER PERSON OR ENTERPRISE, EXCEPT A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE OF THE UNLAWFUL CONDUCT AND WHO IS NOT KNOWINGLY TAKING PART IN AN ILLEGAL TRANSACTION, HOLDS THE PROPERTY, ITS PROCEEDS AND ITS FRUITS IN CONSTRUCTIVE TRUST FOR THE BENEFIT OF PERSONS ENTITLED TO REMEDIES UNDER THIS SECTION.

~~E.~~ F. In addition to or in lieu of an action under this section the state may file an action pursuant to section 13-106 for forfeiture ~~to the general fund of the state or county as appropriate~~, to the extent not already ordered paid pursuant to this section, of:

1. Any interest acquired or maintained by a person in violation of section 13-2312.

2. Any interest in, security of, claims against or property, OFFICE, TITLE, LICENSE or contractual right of any kind affording a source of influence over any enterprise OR OTHER PROPERTY which a person has ~~established, operated, controlled~~ ACQUIRED OR MAINTAINED AN INTEREST IN OR CONTROL OF, conducted or participated in the conduct of in violation of section 13-2312.

3. All proceeds traceable to an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, PROPERTY and other things of value used or intended to be used to facilitate the commission of the offense.

~~F.~~ G. A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purposes of this subsection, a conviction may result from a verdict or plea including a no contest plea.

~~G.~~ H. Notwithstanding any law ~~to the contrary~~ CREATING A LESSER PERIOD, the initiation of civil proceedings related to violations of any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, INCLUDING PROCEDURES PURSUANT TO SECTION 13-106, shall be commenced within seven years after actual discovery of the violation.

~~H.~~ I. This state may, in any civil action brought pursuant to this section, file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or presiding chief judge of the superior court IN THE COUNTY in which such action is pending and, upon receipt of such copy, the judge shall immediately designate a judge to hear and determine the action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination and cause the action to be expedited.

~~I.~~ J. The standard of proof in actions brought pursuant to this section is the preponderance of the evidence test.

~~J.~~ K. A person other than the attorney general or county attorney who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court. The notice shall identify the action, the person and the person's attorney. Service of the notice does not limit or otherwise affect the right of the state to maintain an action under this section or intervene in a pending action nor does it authorize the person to name the state or the attorney general as a party to the action.

~~K.~~ L. Except in cases filed by a county attorney, the attorney general may, upon timely application, intervene in any civil action or proceeding brought under this section if the attorney general certifies that in his opinion the action is of special public importance. Upon intervention, the attorney general may assert any available claim and is entitled to the same relief as if the attorney general had instituted a separate action.

~~L.~~ M. In addition to the state's right to intervene as a party in any action under this section, the attorney general may appear as amicus curiae in any proceeding in which a claim under this section has been asserted or in which a court is interpreting section 13-2301, 13-2312, 13-2313, 13-2314.01, 13-2314.02, 13-2315 or this section.

~~M.~~ N. A civil action under this section is remedial AND NOT PUNITIVE and does not limit AND IS NOT LIMITED BY any other PREVIOUS OR SUBSEQUENT civil or criminal action under this ~~article~~ TITLE or any other provision OF LAW. Civil remedies provided under this ~~section~~ TITLE are supplemental and not mutually exclusive.

O. IN THIS SECTION AND SECTION 13-2312:

1. "ACQUIRE" MEANS FOR A PERSON TO DO ANY OF THE FOLLOWING:

(a) POSSESS.

(b) ACT SO AS TO EXCLUDE OTHER PERSONS FROM USING THEIR PROPERTY EXCEPT ON HIS OWN TERMS.

(c) BRING ABOUT OR RECEIVE THE TRANSFER OF ANY INTEREST IN PROPERTY, WHETHER TO HIMSELF OR TO ANOTHER PERSON, OR TO SECURE PERFORMANCE OF A SERVICE.

2. "GAIN" MEANS ANY BENEFIT, INTEREST OR PROPERTY OF ANY KIND WITHOUT REDUCTION FOR EXPENSES OF ACQUIRING OR MAINTAINING IT OR INCURRED FOR ANY OTHER REASON.

3. "PROCEEDS" INCLUDES ANY INTEREST IN PROPERTY OF ANY KIND ACQUIRED THROUGH OR CAUSED BY AN ACT OR OMISSION, OR DERIVED FROM THE ACT OR OMISSION, DIRECTLY OR INDIRECTLY, AND ANY FRUITS OF THIS INTEREST, IN WHATEVER FORM.

13-2314.01. Anti-racketeering revolving fund; use of fund

A. There is established an anti-racketeering revolving fund to be administered by the attorney general under the conditions and for the purposes provided by this section. Monies in the fund are exempt from the lapsing provisions of section 35-190.

B. Any prosecution and investigation costs, including attorney's fees, recovered for the state by the attorney general as a result of enforcement of civil and criminal statutes pertaining to any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or section 13-2312, whether by final judgment, settlement or otherwise, shall be deposited, as directed by a court of competent jurisdiction, in the fund established by this section. When the fund exceeds fifty thousand dollars, all funds in excess of the fifty thousand dollars shall be deposited in the state general fund.

C. The monies in the fund shall be used by the attorney general for the investigation and prosecution of any offense, within the jurisdiction of the attorney general, included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or section 13-2312, including civil enforcement.

D. On or before the fifteenth day of January, April, July and October, the attorney general shall cause to be filed with the governor, with copies to the director of the department of administration, the president of the senate and the speaker of the house of representatives, a full and complete public account of the receipts and disbursements from the fund in the previous calendar quarter.

13-2314.02. Racketeering lien; content; filing; notice; effect

A. The state, upon filing a civil action under section 13-2314 or upon charging an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312, may file in accordance with this section a racketeering lien. A filing fee or other charge is not required for filing a racketeering lien.

B. A racketeering lien shall be signed by the attorney general or the county attorney representing the state in the action and shall set forth the following information:

1. The name of the defendant whose property or other interests are to be subject to the lien.
2. In the discretion of the attorney general or county attorney filing the lien, any aliases or fictitious names of the defendant named in the lien.
3. If known to the attorney general or county attorney filing the lien, the present residence or principal place of business of the person named in the lien.
4. A reference to the proceeding pursuant to which the lien is filed, including the name of the court, the title of the action and the court's file number for the proceeding.
5. The name and address of the attorney representing the state in the proceeding pursuant to which the lien is filed.
6. A statement that the notice is being filed pursuant to this section.
7. The amount which the state claims in the action or, with respect to property or other interests which the state has requested forfeiture to the state or county, a description of the property or interests sought to be paid or forfeited.
8. If known to the attorney general or county attorney filing the lien, a description of property which is subject to forfeiture to the state or property in which the defendant has an interest which is available to satisfy a judgment entered in favor of the state.
9. Such other information as the attorney general or county attorney filing the lien deem appropriate.

C. The attorney general or the county attorney filing the lien may amend a lien filed under this section at any time by filing an amended racketeering lien in accordance with this section which identifies the prior lien amended.

D. The attorney general or the county attorney filing the lien shall, as soon as practical after filing a racketeering lien, furnish to any person named in the lien a notice of the filing of the lien. Failure to furnish notice under this subsection does not invalidate or otherwise affect a racketeering lien filed in accordance with this section.

E. A racketeering lien is perfected against interests in personal property by filing the lien with the secretary of state, except that in the case of titled motor vehicles it shall be filed with the motor vehicle division. A racketeering lien is perfected against interests in real property by filing the lien with the county recorder of the county in which the real property is located. The state may give such additional notice of the lien as it deems appropriate.

F. The filing of a racketeering lien in accordance with this section creates a lien in favor of the state in:

1. Any interest of the defendant, in real property situated in the county in which the lien is filed, then maintained or thereafter acquired in the name of the defendant identified in the lien;

2. Any interest of the defendant, in personal property situated in this state, then maintained or thereafter acquired in the name of the defendant identified in the lien; and

3. Any property identified in the lien to the extent of the defendant's interest therein.

G. The filing of a racketeering lien under this section is notice to all persons dealing with the person or property identified in the lien of the state's claim. The lien created in favor of the state in accordance with this section is superior and prior to the claims or interests of any other person, except a person possessing:

1. A valid lien perfected prior to the filing of the racketeering lien.

2. In the case of real property, an interest acquired and recorded prior to the filing of the racketeering lien.

3. In the case of personal property, an interest acquired prior to the filing of the racketeering lien.

H. Upon entry of judgment in favor of the state, the state may proceed to execute thereon as in the case of any other judgment, except that in order to preserve the state's lien priority as provided in this section the state shall, in addition to such other notice as is required by law, give at least thirty days' notice of such execution to any person possessing at the time such notice is given, an interest recorded subsequent to the date the state's lien was perfected.

I. Upon the entry of a final judgment in favor of the state providing for forfeiture of property to the state, the title of the state to the property:

1. In the case of real property, or a beneficial interest in real property, relates back to the date of filing the racketeering lien with the county recorder of the county where the real property is located, or if no racketeering lien is filed, then to the date of recording of the final judgment or the abstract thereof with the county recorder of the county where the real property is located.

2. In the case of personal property or a beneficial interest in personal property, relates back to the date the personal property was seized by the state, or the date of filing of a racketeering lien in accordance with this section, whichever is earlier, but if the property was not seized and no racketeering lien was filed then to the date the final judgment was filed with the secretary of state, or in the case of a titled motor vehicle, with the motor vehicle division.

J. This section shall not limit the right of the state to obtain any order or injunction, receivership, writ, attachment, garnishment or other remedy authorized under section 13-2314 or appropriate to protect the interests of the state or available under other applicable law, including without limitation, title 44, chapter 8, article 1.

13-2314.03. County anti-racketeering fund; use of fund

A. The board of supervisors of a county may establish a county anti-racketeering fund under the conditions and for the purposes provided by this section.

B. Any prosecution and investigation costs, including attorney fees, recovered for the county as a result of enforcement of civil and criminal statutes pertaining to any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or section 13-2312, whether by final judgment, settlement or otherwise, may be deposited, as directed by a court of competent jurisdiction, in the fund established by the board of supervisors. If the fund exceeds fifty thousand dollars, monies in excess of the fifty thousand dollars shall be deposited in the county general fund.

C. The monies in the fund shall be used for the investigation and prosecution of any offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or section 13-2312, including civil enforcement.

13-2315. Racketeering; investigation of records; confidentiality; court enforcement; classification

A. A custodian of the records of a financial institution as defined in section 13-2301 shall, at no expense to the financial institution, produce for inspection or copying the records in the custody of such financial institution when requested to be inspected by the attorney general or a county attorney authorized by the attorney general, provided such person requesting such information signs and submits a sworn statement to the custodian that the request is made in order to investigate racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312. Such records may be removed from the premises of the financial institution only for the purpose of copying the records and shall be returned within forty-eight hours. The attorney general or an authorized county attorney or any peace officer designated by such county attorney or the attorney general shall be prohibited from using or releasing such information except in the proper discharge of official duties. The furnishing of records in compliance with this section by a custodian of records shall be a bar to civil or criminal liability against such custodian or financial institution in any action brought alleging violation of the confidentiality of such records.

B. The attorney general or the authorized county attorney may petition the superior court for enforcement of this section in the event of noncompliance with the request for inspection. Enforcement shall be granted if the request is reasonable and the attorney general or the authorized county attorney has reasonable grounds to believe the records sought to be inspected are relevant to a civil or criminal investigation of an offense included in the definition of racketeering in section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312.

C. The investigation authority granted pursuant to the provisions of this section may not be exercised by a county attorney in the absence of authorization by the attorney general.

D. Any person releasing information obtained pursuant to this section, except in the proper discharge of official duties, is guilty of a class 2 misdemeanor.

13-2316. Computer fraud; classification

A. A person commits computer fraud in the first degree by accessing, altering, damaging or destroying without authorization any computer, computer system, computer network, or any part of such computer, system or network, with the intent to devise or execute any scheme or artifice to defraud or deceive, or control property or services by means of false or fraudulent pretenses, representations or promises.

B. A person commits computer fraud in the second degree by intentionally and without authorization accessing, altering, damaging or destroying any computer, computer system or computer network or any computer software, program or data contained in such computer, computer system or computer network.

C. Computer fraud in the first degree is a class 3 felony. Computer fraud in the second degree is a class 6 felony.

13-2317. Money laundering; classifications; definitions

A. A PERSON WHO ACQUIRES OR MAINTAINS AN INTEREST IN, TRANSFERS, TRANSPORTS, RECEIVES OR CONCEALS THE EXISTENCE OR NATURE OF RACKETEERING PROCEEDS KNOWING OR HAVING REASON TO KNOW THAT THEY ARE THE PROCEEDS OF AN OFFENSE IS GUILTY OF MONEY LAUNDERING IN THE SECOND DEGREE.

B. A PERSON WHO KNOWINGLY INITIATES, ORGANIZES, PLANS, FINANCES, DIRECTS, MANAGES, SUPERVISES OR IS IN THE BUSINESS OF MONEY LAUNDERING IS GUILTY OF MONEY LAUNDERING IN THE FIRST DEGREE.

C. MONEY LAUNDERING IN THE SECOND DEGREE IS A CLASS 3 FELONY. MONEY LAUNDERING IN THE FIRST DEGREE IS A CLASS 2 FELONY.

D. IN THIS SECTION, "ACQUIRE" AND "PROCEEDS" HAVE THE SAME MEANING AS PRESCRIBED IN SECTION 13-2314.

Senator HATCH. Professor Blakey, we will take your testimony at this time.

Professor BLAKEY. Mr. Chairman, I would like to thank you for the opportunity to appear here to testify—and, in a sense, to return home. I was the chief counsel to the subcommittee that drafted this RICO bill.

Senator HATCH. With my great friend, Senator McClellan.

Professor BLAKEY. Yes. I worked for Senator McClellan for just about 4 years, and the truth of the matter is I worked for Senator Hruska, too, for 4 years. The two of them were "twins." I worked also for Congressman Poff in the House. So that when I come back here it is truly coming home.

The statement that I prepared—and not, certainly, by myself, but with a number of State attorneys general and their staffs, responds in great deal to most of what you have heard this morning and most of what you have heard in previous hearings. And I would express my hope that you and your staff will have an opportunity to go over it. This subject matter—RICO reform—is a good deal more complex than can be conveyed in a 10- or 15-minute statement, particularly where those statements, as you have heard from the previous witnesses, are largely couched in generalities. You have to get into the nitty-gritty. In fact, that is what I would like to do with you, if I can, for a few minutes.

Mr. Justice Holmes once said that we ought to "think things, and not words." Let me give you the concrete example that Senator Metzenbaum asked for. And with your permission, Mr. Chairman, I would like to insert in the record at this point in my testimony a newspaper article from the Virginian-Pilot, Friday, July 19, 1985, which reviews a recent settlement under Federal RICO, where I happened to be the counsel. I would also invite you to secure testimony from the bank. The one thing you ought not do is hear about these cases from one side only; you ought to hear from both. If you hear about abuse from the plaintiff's point of view, you ought also to hear what the defendant's perspective is—and vice versa.

Senator HATCH. Without objection, it will be included in the record.

[Aforementioned articles follow:]

[From the Virginian-Pilot, July 19, 1985]

COURT REVEALS AGREEMENT IN ATLANTIC PERMANENT SUIT

(By Terry Carter)

NORFOLK.—The terms of a confidential out-of-court settlement by Atlantic Permanent Federal Savings, and Loan Association were made public Thursday evening after attorneys suing the lending institution complained to a federal judge that its president had made improper statements what were quoted in a newspaper story.

Under the agreement, $115,000 will be divided among nine families whose case against Atlantic Permanent, alleging involvement by the institution in a home improvement fraud scheme, was scheduled to go to trial Monday.

Further, the settlement awards all costs and fees to the plaintiffs' lawyers—Seawell Dalton Hughes & Timms—with the amount to be determined by a judge. The plaintiffs will not have to pay any portion of their awards to their lawyers.

The agreement includes a provision to compensate, if merited, an additional 52 families who have retained the Norfolk law firm. During the past month, two additional lawsuits had been filed on behalf of 12 of those families.

Any other potential victims who contact the firm the agreement says, will be eligible for actual damages. Those damages could be collected in cases in which they lost a home through foreclosure or in which they paid for work that was "demonstrably not done or improperly done" according to the terms the original contracts.

U.S. District Judge J. Calvitt Clarke Jr. on Thursday authorized the release of the terms of the agreement after Edgar S. Everhart, president and chairman of the board of Atlantic Permanent, was quoted Thursday in The Ledger-Star describing the settlement. "From the beginning, I stated the suit was without merit and I'd say that the terms of the settlement reinforce that opinion," Everhart said in the article.

A. Jackson Timms, an attorney representing the plaintiffs, said he was shocked by Everhart's statement and asked Clarke to release the terms of the agreement and to require a retraction by Everhart.

Everhart's comments breached the confidentiality agreement that Atlantic Permanent's lawyers had demanded in the settlement, Timms said.

After lawyers for both sides met Thursday afternoon with Clarke, Timothy A. Coyle, an attorney for Atlantic Permanent, telephoned The Virginian-Pilot and The Ledger-Star from the judge's office to read the following statement from Everhart: "Realizing that the settlement was confidential and that the settlement was in the best interest of all parties, I should not have commented on it. I was wrong and regret and retract my statement that the suit and settlement were without merit."

"We believe the complaint had substantial merit," Timms said after the retraction. "The terms of the agreement speak for themselves."

The settlement agreement, signed by all parties Wednesday, did not include a disclaimer by the defendants of any negligence, wrongdoing or liability that often is included in such documents.

Under the terms of the agreement, damages in cases of foreclosure will be determined by computing the equity in the home at the time of foreclosure and adding 5 percent interest per year.

In cases that do not involve foreclosure, any potential victim who can demonstrate a valid claim of more than $100 will be compensated for damages. The claims will also be subject to statutes of limitations.

To recover, the potential victim must show that the home improvement contract or the loan papers included forgeries, or that fraud had been committed by home improvement salesmen and contractors.

"There would be no recovery for alleged overpricing, punitive damages, loss of creditworthiness, emotional distress or any damages other than the loss," the agreement states.

Timms and Atlantic Permanent's lead attorney, Francis N. Crenshaw, will review all claims other than the nine that had been scheduled for trial Monday. In the event the two lawyers cannot agree on the fair-market value of the homes or the value of incomplete work, they will appoint an independent appraiser whose evaluation will be binding, according to the agreement.

Both attorneys will be paid $125 an hour by Atlantic Permanent for reviewing the claims. If any claims are disputed, the matter will go before a U.S. magistrate, with Atlantic Permanent paying both attorneys at the hourly rate.

Costs incurred in the reviews, such as hiring appraisers, and in any hearings before a magistrate would be shared equally by the two sides.

Under the agreement, plaintiffs' attorneys can receive no more than a total of $10,000 from Atlantic Permanent for handling any claims beyond those that were scheduled for trial Monday. Further payment would come out of any money recovered by additional plaintiffs.

Timms' firm cannot, under terms of the settlement, provide use of its files to other lawyers who might represent other potential victims.

Further, Timms' firm agreed not to solicit more clients.

The plaintiffs' lawyers originally sought to represent as many as 750 alleged victims in a class action, Judge Clarke denied the motion.

The settlement resulted from negotiations begun last week when a final pretrial hearing was canceled at the last minute.

The two recent lawsuits representing 12 families went beyond the earlier one by including plaintiffs who did not lose their homes to foreclosure but allegedly were damaged by fraud.

Timms had said earlier this month that his firm had more clients and planned to file more suits.

The targeted victims, the suit alleged, included the aged, the poor, the elderly and the physically and mentally handicapped. The plaintiffs' lawyers alleged in pretrial proceedings that Atlantic Permanent failed to ensure the creditworthiness of the borrowers and that the home improvement dealers sometimes fraudulently inflated the borrowers' incomes on loan applications.

The home improvement salesmen often used illegal cash rebates to induce the customers into signing contracts and loan papers, court papers said, then folded the cash advances to customers back into the long-term loans.

Further, the salesmen often turned in falsified loan paperwork to get payment for jobs they never completed, court papers indicated.

The lawsuit alleged that Willis W. Stephenson who resigned in July 1982 as Atlantic Permanent President; coached the dealers to cover up the illegal practice of rebates by creating fake documentation to make it appear that the homeowners were using the money to purchase materials for improvements and their homes.

On Tuesday, during the settlement negotiations, Timms withdrew from the court record 17 pretrial depositions by potential witnesses that he had filed July 5. Dozens of depositions and other court papers filed earlier will be removed from the court record under the terms of the agreement.

Among the depositions removed from the files were those by the three individual defendants named along with Atlantic Permanent: Stephenson; Harry H. Knickerbocker, executive vice president for the loan division; and Warren P. Fisher, vice president in charge of the home improvement loan department.

Also removed from the court record were depositions by Henry J. Jones, who preceded Fisher as manager of the home improvement loan department; an assistant manager and two former employees of Atlantic Permanent's collections department; and officials of a company that previously insured the lending institution's home improvement loans against defaults.

In denying the class action in March, Judge Clarke told the plaintiffs' attorneys that other lawyers would not hesitate to represent possible victims in complex conspiracy claims against Atlantic Permanent because Timms' firm already had created a public record.

"It's all available to everybody else's lawyer that comes along afterward," Clarke said.

An additional 40 homeowners have retained the Norfolk law firm of Breit, Rutter and Montagna, said Jeffrey A. Breit, one of the Lawyers in the firm. Breit said Thursday that it is not clear how the settlement will apply to his firm's clients.

No Atlantic Permanent officials were charged in the FBI's probe of home improvement fraud that resulted in the convictions of several home improvement salesmen last year.

Henry Jones, who started Atlantic Permanent's home improvement loan department in the late 1960s and managed it until he left in 1979 to open a similar operation in Virginia Beach for Peninsula Savings and Loan, was indicted in September on charges that he knew of fraud by dealers on loans through Peninsula Savings and Loan and concealed it.

Several months before Jones' indictment, four former salesmen for the now-defunct House of Quality Inc. of Virginia Beach and one for the now-defunct Old Dominion Home Improvement Co. of Norfolk were convicted on charges of submitting fasified loan paperwork to Peninsula Savings and Loan to get payment for jobs they never completed.

Jones was acquitted of the charge.

Last year, nine home improvement salesmen for Old Dominion Home Improvement Co. were convicted in federal court for submitting falsified loan paperwork to Atlantic Permanent.

An FBI spokesman confirmed in 1983 that Atlantic Permanent officials were being investigated in connection with wrongdoing by the dealers, but none was charged.

The lawsuit against Atlantic Permanent in the court's civil arena, however, alleged that the lending institution's officers enaged in criminal acts. The racketeering charge in the complaint is defined in federal criminal and civil statutes as an enterprise to obtain money illegally.

The 1970 law known as RICO, for Racketeer-Influenced and Corrupt Organizations Act, was designed as an additional tool against organized crime.

RICO, the U.S. Supreme Court ruled last month, can be used to reach "both legitimate and illegitimate enterprises."

Any jury award resulting from a racketeering complaint is automatically tripled.

The plaintiffs' lawyers based the racketeering charge on routine mailings by Atlantic Permanent to the homeowners—which they alleged constituted mail fraud—and on the obstruction-of-justice charge, alleging officers of the lending institution actively concealed the wrongdoing from regulators and law-enforcement authorities.

Further, the alleged conspiracy was included in the racketeering charge.

The U.S. Supreme Court ruled last month that a criminal indictment is not necessary before instituting a civil racketeering complaint and that the plaintiffs do not have to prove an injury "distinct" from their fraud claims.

Atlantic Permanent's attorneys had argued that the racketeering charge was improper because there had been no criminal convictions of the lending institution's officers and there was no evidence of a "distinct" racketeering injury.

G. Robert Blakey, a University of Notre Dame law school professor and the author of the federal racketeering statutes, is associated as an attorney for the plaintiffs in the cases here. Another of the plaintiffs' attorneys, Stephen Wainger, is a former federal prosecutor.

The trial was expected to last several weeks, with the bulk of testimony and evidence concerning the alleged conspiracy, the plaintiffs' lawyers said in pretrial hearings.

Immediately after the lawsuit was filed in September, Atlantic Permanent bought a half-page newspaper advertisement titled "A Public Message From Atlantic Permanent Savings and Loan." In the advertisement, Everhart, Atlantic Permanent's president, attacked the lawsuit and its "Astronomical" claim for $4.35 billion in damages, which later was dropped for an open ended figure.

"The allegations of wrongdoing are entirely false," Everhart wrote in the advertisement.

Atlantic Permanent maintained thoughout court proceedings that it, too, was victimized by home improvement contractors.

Soon after the suit was filed, the rival law firms, Timms' firm and Crenshaw Ware & Johnson, representing Atlantic Permanent, exchanged charges of improper tactics.

Crenshaw, in court papers alleging the complaint against Atlantic Permanent was frivolous and seeking damages from plaintiffs' attorneys, wrote that the lawsuit's "deficiencies go far beyond careless or shoddy legal work." Crenshaw described as "an outrageous tactic" the plaintiffs' original multi-billion dollar damage claim.

Wainger, responding in court papers, accused Crenshaw's firm of using the tactics of "a cornered alley cat," saying they were "trying to create a smoke screen." Wainger wrote that his firm would seek damages from Crenshaw's firm for libel at the conclusion of the case.

The claims and counterclaims between the two law firms were dropped as part of the settlement.

[From the Virginian-Pilot/Ledger Star, Sept. 15, 1985]

ANATOMY OF A CASE THE JURY NEVER HEARD

(By Terry Carter)

It was, on the surface, glowing news. During 1979, Atlantic Permanent Federal Savings and Loan Association's home-improvement loans had increased by 53 percent over 1978, the press release said. Outstanding home-improvement loans has soared to a new high of $24,382,000. And the institution's home-improvement department had become the largest in the state, one of the biggest in the nation.

"It was very gratifying that these records were achieved during 1979, particularly in view of the less than favorable economic conditions that prevailed during the last half of the year," Willis W. Stephenson, Atlantic Permanent's president at the time, said in the statement.

But beneath the surface of that healthy report were practices that would lead to a four-year FBI investigation, criminal charges against home-improvement contractors and a civil lawsuit against Atlantic Permanent, Stephenson, who resigned in July 1982, and two other top officers.

Last year in federal court, nine home-improvement salesmem were convicted of fraud for falsifying loan documents they has submitted to Atlantic Permanent. In one instance in 1980, the forged signature of a Hampton man who had been dead for seven years, Jesse Blizard, found its way onto loan paper work approved by Atlantic Permanent, court records indicate. The home-improvement dealer who "sold" the contract pocketed $9,663, the amount of the loan.

A civil lawsuit, filed in federal court last September, carried the sins of the contractors to the doorstep of Atlantic Permanent, one of the area's most venerable lending institutions. The suit alleged that the foreclosures of nine families' homes had resulted from a conspiracy between Atlantic Permanent and contractors, and that Atlantic Permanent officers had engaged in racketeering, or obtaining money illegally.

The lawsuit initially sought to represent as many as 700 alleged victims in a class action, which a federal judge refused to certify. Shortly before the trial date, two other suits were filed on behalf of an additional 12 families, and the law firm representing them said they would file more soon. In all, 52 families has retained the firm.

Atlantic Permanent and its attorneys have maintained that the lending institution was, like the homeowners, the victim of crooked contractors. Whether the wrongdoing went further than the home-improvement dealers may never be known. On July 16, the lawsuit was settled out of court.

But last week, U.S. District Judge J. Calvitt Clarke Jr., in a hearing to determine fees to be awarded to the plaintiffs' attorneys, said that he may have been "heavy handed" in persuading the plaintiffs to settle and that Atlantic Permanent "probably would have lost" had the case gone to trial. Clarke also said the plaintiffs' lawyers "had a pretty strong case" in their attempt to prove conspiracy involving officers of the lending institution. In pressuring both sides to settle the case, Clarke added, "All I wanted to do was put the people back in their houses and keep Atlantic Permanent afloat."

The July settlement provided compensation to victms who could present a viable claim of fraud on the part of home-improvement contractors.

Court papers indicate that since 1977, Atlantic Permanent had made more than 10,000 home-improvement loans under policies and procedures that came under question. Those records showed that the lending institution's policies eventually were changed at the urging of the Federal Home Bank Board.

As part of the settlement, thousands of pretrial papers—including sworn statements to lawyers from scores of potential witnesses—were removed from the record in U.S. District Court in July. But in the months before the documents were removed, they were reviewed by The Virginian-Pilot and The Ledger-Star. In addition, interviews were conducted with some of the salesmen before they were indicted and with other people familiar with the case, some of them listed as witnesses in civil lawsuit that never went to trial.

The following account, based on those court records and interviews, pieces together a complex scam in which contactors preyed on hundreds, possibly thousands, of Hampton Roads homeowners.

"I'd rather you had robbed a bank." U.S. District Judge Robert G. Doumar, upon sentencing Floyd Sawyer, May 4, 1984.

Floyd W. Sawyer always wore a suit to his office at Old Dominion Home Improvement Co. on Pickett Road in Norfolk. He drove a Cadillac and a Datsun 280-Z. He lived in a $300,000 home on the Lynnhaven River in Virginia Beach. But the real money was not to be made in affluent neighborhoods, Sawyer, the company's founder, told his salesmen. The big bucks would come mostly from black neighborhoods, places like Huntersville, Berkley and Park Place in Norfolk, Seatack in Virginia Beach, Truxtun in Portsmouth—wherever salesmen found modest, sometimes ramshackle, homes.

Sawyer made half a million dollars in 1980, a former official in his company said. He received half of the profit from each job sold by his 20 salesmen, said W. Allen Kitchen, the former treasurer and a salesman for Old Dominion. Sawyer said in an interview that he made less than that.

Old Dominion was the area's leader in sheer numbers of home improvements, said contractors and others familiar with the industry in Hampton Roads. The sales pitches were slick, victims said in sworn statements, and the salesmen fast-talking.

As Donna and Barney Millsaps discovered, one of the sales pitches Kitchen used came straight from the Bible.

"Well, he tricked me," Donna Millsaps recalled several months ago in sworn pretrial testimony. "He won me over. He tricked me by coming in the name of the Lord, and I trusted him. . . . He was quoting Bible verses. . . . Donna Millsaps surmised that Kitchen, who appeared at her door in April 1980, probably had taken his cue from a Christian bumper sticker on her car.

Donna Millsaps, 39, and her 43-year-old husband, Barney, a worker at the Norfolk Naval Shipyard in Portsmouth, bought their home in the 600 block of Biltmore Road in 1976. The house is in the Cottage Park section, just off Tidewater Drive behind Southern Shopping Center. The Millsapses had wanted a room addition but didn't think they could afford it—until they were approached by the Bible-quoting salesman. Kitchen told Donna Millsaps that the payments would be no more than $50 a month, she said. She could even have $2,200 cash folded into the long-term loan.

"We were convinced that there was no way we were going to get a loan," Donna Millsaps said. "It was mostly done in fun, them filling this out, how they were going to build a room, because we knew we couldn't get it. It just something out of our reach." Two weeks later, Donna Millsaps came home from shopping and found "two guys out back beating up the cement starting to build a room." She asked the workmen what they were doing. ". . . And the guy says very nastily, 'We're building you a blankety-blank room.' "

Later, Donna Millsaps said, she was asked to sign loan papers, most of which were blank. The salesman said they would be filled in later. A woman who worked at Old Dominion Home Improvement notarized the deed of trust although the Millsapses were not in the notary's presence.

Donna Millsaps said she had no idea that the deal would put a second mortgage on her home. And the monthly payment came as a surprise: $140 for 15 years. A few months after the work was completed, she said, the new room started sinking. The wall and ceiling began to separate where the room joined the house.

By 1981, the Millsapses had fallen behind in their loan payments and other bills because of expenses stemming from an automobile accident and a funeral for a relative they had been helping financially, according to Donna Millsaps' sworn statement. Virginia National Bank, holder of the first mortgage on the Millsapses' home, initiated foreclosure proceedings, and the house was sold at auction on the steps of Norfolk Circuit Court on May 28, 1981.

"Mr. and Mrs. Millsaps signed a note they knew they could not afford," Francis N. Crenshaw, the lead attorney for Atlantic Permanent, wrote in a pretrial brief. "They stated that they had trusted in the Lord to find a way to pay for the new room but never found one."

In depositions, other plaintiffs told similar stories of fast-talking salesmen, work that was never completed, payments that could not be met and homes that were lost.

In interviews, salesmen themselves recited ruses designed to induce customers to sign contracts and loan papers. "The magic ticket was a $15,000 job; that's what you want for," said a former salesman who asked that his name not be used. "You sold the people on the payment, you never talked $15,000, you always talked payment. That's American salesmanship. Half the time they didn't know how many years it was for."

Sometimes the salesmen offered illegal cash rebates—occasionally in the thousands of dollars—then folded the cash advances back into the home improvement loans, according to court records. Money also was offered for leads on prospective customers, several salesmen admitted in interviews. Such inducements are illegal in

Virginia. For getting a friend or neighbor to meet with the saleman, the customer would get $100 or $200 if the referral resulted in a sale.

While explaining the referral bonus, the dealers sometimes would plunk $100 in cash on the table in front of the customer "just to prime the pump," one former Old Dominion salesmen said. Salesmen also forged customers' signatures on loan papers and deeds of trust and inflated their incomes so they could qualify for loans. In one instance, an elderly Berkley couple was listed on a loan application as earning $100 a month each as gardeners. The man is partially paralyzed and the woman is blind. Neither works, they said in an interview.

Contractors were required to present a completion certificate to a customer to sign when the work was finished to his satisfaction. The signed document indicated to Atlantic Permanent that the work was done and that the loan money could be given to the contractor.

In the late 1970s and early '80s, it didn't always work that way. All nine of the home-improvement salesmen convicted in federal court of fraud involving loans through Atlantic Permanent pleaded guilty to submitting falsified completion certificates or other loan paper work to the lending institution. They admitted that they turned in the documents, knowing the jobs were not complete, to get payment from the lender.

By late 1980, former Old Dominion salesmen said, loans were so easy to obtain that some of the dealers didn't even bother getting homeowners to sign the loan documents at all.

Henry J. Jones, who started Atlantic Permanent's home-improvement department in 1967, was the only banker indicted in the federal probe of home-improvement fraud here. The charges didn't concern Jones' work at Atlantic Permanent, however. And he was acquitted. Jones was indicted on allegations that—within months of leaving Atlantic Permanent in 1979 for a competing lending institution, Peninsula Savings & Loan Association—he concealed the fact that dealers were submitting falsified loan paper work to Peninsula Savings.

U.S. District Judge Robert G. Doumar last December refused to let the case go to the jury. The government had failed to show "affirmative action" by Jones to conceal fraud by the dealers, Doumar ruled.

Some of those dealers had followed Jones from Atlantic Permanent, where he had spearheaded the growth of the biggest home-improvement department in the area, court records showed.

On March 3, 1977, while Jones was still at Atlantic Permanent, he wrote a memo to Willis Stephenson in which he alluded to "income problems" at the lending institution and suggested a possible remedy. That remedy: Increase the size of the home-improvement loan portfolio.

Under a system Jones had established at Atlantic Permanent and later implemented at Peninsula Savings, it was not uncommon for all of the loan paper work to be handled by contractors, court papers showed. Most customers, in fact, had no direct contact with loan officers or other bank employees.

Almost seven weeks after Jones' memo, on April 19, a Norfolk lawyer wrote a letter to Atlantic Permanent that was a portent of problems to come. The nature of the complaint would be echoed by others over the next several years, eventually becoming a refrain in court seven years later during the criminal prosecution of contractors.

The lawyer, Joseph A. Gawrys, wrote to Atlantic Permanent on April 19, 1977, alleging that his clients had been induced by a contractor into signing a completion certificate for a home-improvement loan on a job that, after the contractor got the money, was never completed.

On June 29, Jones wrote another memo to Stephenson, defending the system of dealer-originated loans, explaining that there were sufficient safeguards to protect Atlantic Permanent against losses from a significant number of homeowners failing to keep up payments. ". . . We have a number of substantial dealers on our list who have personally endorsed slow credit and marginal equity accounts to insure a minimum amount of losses for the association. . . ." Jones wrote. "To make any changes in our loan underwriting would slow our service. . . . I can assure that many of the loans that we turn down somebody will make."

When Jones left Atlantic Permanent to begin a home-improvement department for Peninsula Savings in Virginia Beach, competiton between the rival home-improvement departments became fierce.

Under Jones' successor, Warren P. "Buddy" Fisher, Atlantic Permanent's home-improvement loan department changed proceduers to help persuade dealers not to take their business elsewhere. Among other things, it offered them streamlined service in processing loans.

Fisher had no background in home-improvement loans. He had been in charge of purchasing office supplies at the lending institution since 1974; he later assumed added duties as security officer, managing the alarms and security at Atlantic Permanent's offices.

Richard T. Robol, an attorney for the plaintiffs in the civil suit against Atlantic Permanent, asked Floyd Sawyer under oath if the dealers had been involved in training Fisher after he took over the home-improvement loan department. "Well, he didn't have any lending experience that we knew about, so we tried to point out things to him the best we could," Sawyer replied. At the time, Sawyer's Old Dominion Home Improvement Co. was Atlantic Permanent's highest-volume dealer.

Under Fisher, Atlantic Permanent began approving jobs that previously would not have been accepted, Sawyer said in his deposition. "They would take deals that were closer in equity than they would before," Sawyer said. Sawyer's business there doubled, he said, and he increased his sales staff from 10 to 20.

Despite Stephenson's sanguine report about record growth in home improvement loans, some Atlantic Permanent employees were troubled by the loan policies. "It was amazing to me that we would make loans to particular people," Robert B. Jones, a collections agent in the early 1980s, said in a sworn statement. Jones previously worked for another mortgage lender and now manages a Pizza Hut restaurant in Portsmouth. In one case, Jones said, a loan file contained a photograph of the house next door to the one for which a loan had been made. Other times, he said, loans that were listed as second mortgages actually were fourth and fifth mortgages.

Another former member of Atlantic Permanent's collections staff, Debra P. Copley, said in a deposition that in reviewing loan files for foreclosure in 1982, she found that many of the home-improvement jobs were for "exorbitant prices." Copley worked as a Kelly Girl at Atlantic Permanent in February 1982, then took a full-time position in the collections department from May through August of that year. "Just judging from what I saw on the records, I felt that the amount of work that was being done on some of the properties was, you know, I judge it to be maybe a thousand dollars worth of work, and the client was being charged five or 10 times what I felt the value of the work was," she said in her sworn statement. "And then by the time Atlantic Permanent added all of their interest rates and it—sometimes for a thousand dollars worth of work, the loan balance ended up to be $20,000."

By early 1980, complaints about certain home-improvement dealers had mounted in the offices of the Better Business Bureau of Southeastern Virginia and consumer protection agencies throughout Hampton Roads. On April 9, 1980, George Whitaker, chief of consumer protection in Newport News, wrote to Atlantic Permanent and other area lenders detailing abuses in the local home-improvement business and questioning the relationship between contractors and financial institutions.

"We have found that contractors are returning to the financial institution with statements or 'certificates of completion' for payment when completion has not actually occurred," Whitaker wrote.

In May, he wrote Atlantic Permanent's home-improvement department about a company, Post Pools/Eastern Weatherseal Co., that had failed to complete a job begun 15 months earlier. Three weeks later, he wrote another letter, this time to Sidney S. Bailey, commissioner of the state Bureau of Financial Institutions, which regulates banking institutions. Whitaker's letter concerned a consumer complaint against the now-defunct Superior Home Improvement Co. and one of its loans through Atlantic Permanent.

Whitaker questioned what appeared to be a loan-within-a-loan created by the dealer. The customer had been induced into the contract with a $1,000 "rebate," or cash kickback, from the contractor that, after some costs were deducted, amounted to $592, Whitaker wrote.

That month Bailey got a similar letter from Martin D. Greenwell, chief of consumer protection in Norfolk. In his June 15 letter, Greenwell detailed problems with two contractors and loans through Peninsula Savings.

On June 20, Atlantic Permanent's Fisher wrote a letter to dealers concerning truth-in-leading practices and penalties for violating the regulations.

On June 26, Whitaker received a letter from Atlantic Permanent's president, Stephenson, saying that Bailey had contacted the lending institution about Whitaker's complaint and that Stephenson had responded. "And let me assure you," Stephenson wrote to Whitaker, "that we have been unable to uncover any previous knowledge or evidence in our files regarding any rebate, discount or other type consideration received by (the homeowner) from Superior Home Improvement Company."

The next day, June 27, Stephenson wrote another letter, this one to home-improvement contractors who dealt with Atlantic Permanent, telling them that he had been contacted by Whitaker and the commissioner of the Bureau of Financial Institutions about abuses in the home-improvement industry statewide. Stephenson wrote that Atlantic Permanent would hold a meeting the next week, on July 3, at its Independence Boulevard office in Virginia Beach "in order to more fully and in more detail discuss a number of the problem areas that we see ahead in the consumer-related business activities as they involve you as a home-improvement dealer."

"We would like for this meeting to be a meeting between management of this association and our home-improvement company owners," he wrote. "Some matters will be discussed that you probably will not wish to share with your sales people . . . ."

Between 40 and 50 dealers attended the July 3 meeting and lunched on chicken before Stephenson called the meeting to order.

"He first asked, 'Any news reporter in the building?' " John Sadler, a contractor who was at the meeting, said in a deposition. Stephenson then asked if there were any tape recorders in the room, Sadler said. A dealer who had one was asked to turn it off, he said.

Stephenson cursed and used vulgarities repeatedly during the meeting, said several people who were there. Stephenson was asked later in a deposition about his language. "I grew up on a farm and plowed a mule," the Severn, N.C., native said in the deposition. "Have you ever plowed a mule? You learn to curse."

At the meeting, the problem of cash "rebates" was brought up. "We told them we were going to do this through Colonial Service, and that they could not borrow from the proceeds being used for home improvements," Stephenson said in the deposition.

Colonial Service Corp., Atlantic Permanent's wholly owned subsidiary, handled what the bankers called equity and consolidation loans, meaning homeowners could borrow cash for things other than work on their homes. At the time, Atlantic Permanent was not licensed to make such loans.

During the meeting, Stephenson referred the question about extra cash for homeowners to Fisher. Fisher said in a deposition that he told the dealers there was nothing wrong with a "multiple contract loan" that would give money to the homeowner for his own use in work on the house. The customer would have to submit a contract for the work that was not being handled by the contractor, he said, "It wasn't necessary for a customer to have two loans in order for them to accomplish what they were trying to do" Fisher said.

Two home-improvement salesmen, however, said in depositions that Atlantic Permanent officers knew some dealers were giving extra cash to homeowners. One of them, Kitchen, the former Old Dominion salesman who was convicted last year of submitting fraudulent loan paper work, said in his sworn statement that Atlantic Permanent knew cash kickbacks were used to induce customers.

And Sadler said in a deposition that Stephenson told some of the dealers at the meeting "that if you give somebody any cash kickback, or you disburse cash to a customer out of your contract price, you are to make a material list and put it in the job folder to cover this sum, as if you give them the money to buy this material."

Sadler, former president of the Tidewater Home Improvement Builders Association, the local home-improvement trade association, said in an interview that Stephenson indicated he was referring to loans and jobs already completed. Stephenson told several dealers at the meeting, in a conversation with Sadler and several other contractors, to put a phony materials lists in job folders to cover rebates already given to customers, Sadler said.

Larry Vaughn, president of Burgess Snyder Window Co. and currently president of the local home-improvement trade association, said in an interview and in a deposition that he left the meeting early when he realized Stephenson was going to tell dealers how to skip banking regulations. Vaughn said in an interview that he immediately withdrew all of his company's and his personal accounts from Atlantic Permanent.

In the weeks after the meeting, abuses by home-improvement dealers continued, court records show. By late summer, complaints had become so widespread that J.N. "Mac" McClanan, Virginia Beach's chief of consumer protection, contacted the federal agency that regulates lending institutions to complain about practices at Atlantic Permanent and Peninsula Savings.

The morning after McClanan contacted the Federal Home Bank Board's regional office in Atlanta, two of its agents were standing in front of his desk. "I was frustrated that we hadn't been able to get anything done through the state banking regulators," McClanan said in an interview. "Greenwell in Norfolk had tried. The only thing left we could do was call the feds."

On Nov. 9, examiners for the Home Loan Bank Board arrived at Atlantic Permanent's home office on Boush Street in Norfolk and began an examination that, accordng to court records, was lengthy. About two weeks later, court papers showed, the company that wrote default insurance on jobs performed by contractors that dealt with Atlantic Permanent notified the savings and loan that it would no longer provide default coverage on loans for Old Dominion jobs.

The insurer, United Guaranty Residential Insurance Company of Greensboro, N.C., had learned that the home-improvement company used illegal cash rebates to entice customers and that some of the deals did not adhere to the insurer's requirements concerning the ratio of the amount of the loan to the value of the home, according to court records.

United Guaranty gave Atlantic Permanent a list of specific "problem" loans, Harry H. Knickerbocker, the executive vice president who heads Atlantic Permanent's loan division, said in a deposition. Knickerbocker, who was named as a defendant in the civil suit filed last year, wrote a memorandum to the collection department concerning the problem, he said. "I said that we would look into those loans," he recalled in the deposition. He added that he did not know the outcome of any internal investigation by Atlantic Permanent.

"Did you take any action with regard to any of the bank's dealers as a result of your investigation about UGRIC's complaints?" asked A. Jackson Timms, a lawyer for the plaintiffs.

"Not that I'm aware of," Knickerbocker replied.

United Guaranty official Jerry Cole, in an interofficer memorandum filed in court, later told of a conversation he had with Atlantic Permanent attorney Timothy A. Coyle: "I pounded on Tim real hard about Atlantic Permanent's constant and chronic failure to act even when problems were brought to their attention, or even when direct requests were made. He confirmed this and said he had found it to be true . . ."

As 1980—the year that had begun with Stephenson's glowing press release—was drawing to a close, Sadler and two other members of THIBA met with Stephenson and other Atlantic Permanent officials, court records showed. Their mission: to complain about contractors who were paid for work that they never completed.

When the Federal Home Loan Bank Board finished its initial examination of Atlantic Permanent, the board's report noted that 83.6 percent of the institution's home-improvement loans were originated by dealers. According to the report, "The lack of controls over those dealers has resulted in major problems, including alleged forgery of loan documents, failure of the dealers to complete contracted improvements, and failure of dealers to deliver Regulation Z (truth in lending) disclosures to the borrowers. . . ."

The examiners also concluded that:

"There are no procedures in effect to insure that the dealers are properly handling" loan documents.

"According to Assistant Vice President Fisher it is not unusual for the deed of trust to be notarized by an employee of the dealer who was not present when the deed of trust was signed."

Of 64 loans reviewed by the examiners, in only one case had the income of the borrower been verified, "Since the loan applications are taken by salesmen whose commissions depend on obtaining financing for the applicant," the report noted, "the association should verify income on at least a sample of loan applications. . . ."

"No system is in force to keep a record of the number and severity of complaints against each dealer."

The examiners recommended that the system of dealer-originated loans be suspended temporarily. But Edgar S. Everhart, who was on the board of directors at the time and is currently Atlantic Permanent's president and board chairman, said in a deposition that the board, after "considerable discussion," decided to continue accepting loan paper from contractors.

And complaints about the dealers continued.

On Jan. 23, James E. Bryan, executive vice president of the Better Business Bureau, met with Stephenson and asked him to check all jobs by certain contractors before disbursing money to them, Bryan said in a deposition.

"In my considered opinion, Atlantic Permanent did not exercise reasonable care in the parameters of (Better Business) bureau policy and procedures in the way that a matter should be handled," Bryan said in the deposition. "In retrospect, we probably should have filed a formal complaint with Atlantic Permanent."

On April 12, responding to a recommendation by the bank board examiners, Fisher wrote a letter to dealers, informing them that in the future all loans would have to be closed in Atlantic Permanent's offices. But 17 days later Fisher wrote the dealers again saying Atlantic Permanent's lawyers had detemined that all loan closings would not have to take place in the lending institution's offices. The letter also said that the procedure for notarizing would be tightened and that employees of the home-improvement companies no longer could notarize loan documents.

The Home Loan Bank Board conducted another examination of Atlantic Permanent in late 1981, court records showed. The report was not filed in open court and bank board officials declined to make copies of the two examinations available or to discuss them. Excerpts appeared in pretrial briefs.

The second review determined that despite the fact that a policy and procedures manual for the home-improvement division had been in effect since July, dealer abuses were continuing, according to court records.

Shortly after the followup examination, beginning in January 1982, Atlantic permanent made several changes in the manual, Among them: Only Atlantic Permanent employees could notarize loan paper work, and all home improvement loan closings would be held in the institution's offices.

After the first examination, bank examiners had advised Atlantic Permanent to start a "customer complaint log," listing the complaints according to the contractor involved. And after the second bank board review, Knickerbocker wrote in a memorandum that all customer complaints must be reported to the loan committee,

Sawyer, in an interview, said Old Dominion Home Improvement Co. felt the effect of the stricter lending policies; the crippled business was forced to close in 1981. And nearly two years after the press release trumpeting Atlantic Permanent's 1979 home-improvement loan portfolio, members of the board of directors received an internal memorandum that said, in part:

"Our volume in the Property Improvement Department has decreased quite significantly. The second examination just completed clearly showed that the FHLBB does not like our dealers relationship . . . and because of their comments new changes will be made . . . and a recommendation is being made to the Board which will decrease our dealer volume substantially. With this decrease in volume, it will seriously affect both the Association's and the Service Corporations's income. . . . Therefore, we must find a way to supplement this loss of income for both the Association and the Service Corporation. . . ."

When the Norfolk law firm of Seawell Dalton Hughes and Timms filed the civil suit against Atlantic Permanent a year ago this month, it sought a total of $4.35 billion in damages. The law firm eventually dropped the dollar amount, which lawyers for Atlantic charged was excessive and was tantamount to harassment.

Under the terms of the July settlement, the nine original plaintiff families will receive a total of $115,000, an average of less than $13,000 per family. And some of the beneficiaries of the settlement are less than pleased.

Two plaintiffs who agreed to the settlement said in interviews that they did so only because they were told that the judge would not allow punitive damages—those that go beyond actual damages. The judge's refusal to allow punitive damages, they were told, could result in appeal and more trials, causing the litigation to go on for years. "The lawyers told me they were going to ask for $300,000 in punitive damages for us," said one plaintiff, who asked not to be identified because her attorneys had advised her not to discuss the settlement with reporters. "I think we deserve it, especially after all this, bringing up all the pain again, going through the deposition brought it all back."

Another plaintiff interviewed said her continuing financial difficulties prompted her agreement to settle. "We had the choice of several thousand dollars now or waiting two years for maybe nothing," she said. "We had to think about it real hard, but we needed money now and took what we could get."

One plaintiff, Emma R. Gray of Norfolk, refused to agree to the settlement and is continuing to press her case with a new lawyer, Robert V. Roussos.

The settlement provides for compensation to those who can make valid claims, which last week numbered 107. The apparent unwillingness of the court to consider punitive damages means that awards would be limited to actual damages—for instance, equity that was lost when a home was lost through foreclosure. "And the majority of the victims won't be helped by the settlement because they didn't have any equity in their homes," said Virginia Beach consumer protection chief McClanan. "In many cases we looked at, the property wasn't worth the amount of the loans."

Plaintiff's attorney Timms said last week in court that the total recovery for all victims could be $1.36 million. But the single biggest pay-out by Atlantic Permanent will undoubtedly be to the Seawell Dalton law firm, which absorbed the cost of the months of litigation. Seawell Dalton has submitted a bill for more than $700,000, according to court records. Judge Clarke is considering the request.

Floyd Sawyer was convicted of three charges of making false statements to a federally insured lending institution. He was sentenced to six months in prison and was fined $15,000 by Judge Doumar. On Sept. 4, 1984, Sawyer entered the Williamsburg City Jail and was released in Jan. 22, 1985, according to court records. He got 1½ months off for good behavior.

Sawyer is still in the home-improvement business. His new company, Sentry Security Inc. of Virginia Beach, was incorporated in September 1982 after Old Dominion's license was revoked for failing to pay court judgments stemming from incomplete work. Sentry Security does remodeling and repairs, and installs burglar alarm systems and smoke detectors in homes.

At first, Sawyer's new business did only the security system installation, said H. Roger Smith, who worked with Sawyer at Old Dominion and later at Sentry Security. But in May 1983, he got a contractor's license in order to do home-improvement contracting.

The state Board for Contractors, responding to a query by The Virginian-Pilot and The Ledger-Star asking how Sawyer had been able to get another license, last month requested that Sawyer relinquish the license.

E.G. Andres, assistant director of the board, said he sent a letter to Sawyer and his attorney requesting that Sawyer surrender his contractor's license. They had not responded by early this month.

Andres, assistant director of the agency, said his office will seek an administrative hearing in Virginia Beach on the matter. The state will argue, Andres said, that Sawyer falsified his application by not listing companies for which he had been licensed, such as Old Dominion, and that he recently was convicted of felonies for fraud in home-improvement contracting and thus is not suitable for licensing.

[From the Virginian-Pilot, Sept. 11, 1985]

S&L Might Have Lost Lawsuit, Judge Says

(By Terry Carter)

Norfolk.—A federal judge said Tuesday that he may have been "heavy-handed" in persuading plaintiffs lawyers to settle out of court in a lawsuit alleging a criminal conspiracy by officials of Atlantic Permanent Federal Savings and Loan Association. Had the case gone to trial, the judge said, the lending institution "probably would have lost."

The comments by U.S. District Judge J. Calvitt Clarke Jr. came during arguments over fees to be awarded attorneys representing scores of plaintiffs who alleged in their suit that Atlantic Permanent officers violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by participating in a home-improvement fraud scheme.

After Atlantic Permanent's attorney, Francis N. Crenshaw, repeatedly told the judge that the plaintiffs' attorney, A. Jackson Timms, had been unable to prove the alleged conspiracy and thus should not be compensated for "overkill" in preparing the case, Clarke rebuked Crenshaw.

"You're being a little unfair," the judge said. "I don't know but that if the court hadn't entered the picture and tried to get this thing settled—I may have been a little heavy-handed—Mr. Timms probably would have tried his case and had a doggone good chance at proving his RICO count. I certainly ruled that he had a right to try, and with the atmosphere of that case, you probably would have lost it.

"You're taking advantage of the court to a certain extent, because you keep saying that Mr. Timms couldn't prove something and you make me have a feeling of guilty conscience because I kept it from being tried. All I wanted to do was put the people back in their houses and keep Atlantic Permanent afloat. You're turning what I consider a good deed on my part against me. You know he had a pretty strong case."

The out-of-court settlement came less than a week before the scheduled trial date of July 22. The agreement provides $115,000 to be divided among the original nine plaintiffs in a suit filed last September and compensation for other potential victims of fraud who contact the Norfolk firm of Seawell Dalton Hughes and Timms. Among claims to be considered are those of 12 families named in two suits Timms' firm filed several weeks before the trial date, 40 families who had retained the law firm and 46 who contacted the lawyers after the settlement was announced.

Timms told the judge Tuesday that potential victims are still contacting his firm.

The settlement stated that attorney fees and costs for the plaintiffs' lawyers would be determined by Clarke and paid by Atlantic Permanent. Testimony Tuesday indicated that Crenshaw asked Timms at the time of settlement how much his firm believed the figure would be and that Timms told him $600,000 in lawyers' fees and $65,000 in expenses.

But the amount is more than that, Timms told the judge, because he had made the estimate without fully checking his firm's tally of hours spent on the case and the expenses incurred.

Crenshaw argued that Timms' firm should be entitled to an amount equal to one-third of the $115,000 awarded the first nine plaintiffs at the time of the settlement. "Do you really expect me to give them only one-third of $115,000?" Clarke replied.

Testimony indicated that during the 14 months the plaintiffs' lawyers prepared the lawsuit, Timms worked 1,123 hours on it, Stephen Wainger spent about 1,140 hours and Richard T. Robol about 1,080. Court records indicate that several other attorneys in the firm also worked on the lawsuit.

"There has never been a case that I've been involved in that had more complexity in the facts and legal issues," Timms said. "We quite literally had to drop off of handling other cases for many months."

If the 98 potential victims seeking damages were to get the same $12,778 average that went to the original nine plaintiffs dividing $115,000, Timms point out to the judge, there would be a total recovery for all victims of $1.36 million.

Clarke said he wished that the fees to the law firm could be based on the eventual payoff of claims to all victims but that that would breach the agreement, which called for payment of attorneys' fees and expenses without regard to the handling of homeowners' claims. "Somebody might pick up the idea that the lawyers got all the money," Clarke said. "If somebody complains, somebody will write stories. There's been a lot of criticism of the legal profession in asbestos and other cases. That's not the case here."

Clarke said he would rule on the fees as soon as possible.

Timms' firm took a calculated risk when it began working on the case in May 1984, Crenshaw said, and simply "couldn't produce a conspiracy, a punitive (damage) situation."

"You're saying they completely failed to prove a case, and that's not so," Clarke replied.

The charge that made the basis of the complaint, racketeering, is defined in federal civil and criminal statutes as an enterprise to obtain money illegally. Congress passed the law in 1970 to combat organized crime, but in recent years, RICO cases have proliferated against legitimate businesses. The reason, legal experts say, is that any damage award in a civil RICO complaint is automatically tripled, and the defendants pay legal fees and expenses.

The lawsuits alleged that beginning in 1977, Atlantic Permanent conspired with several home improvement dealers to defraud homeowners. Among the allegations of fraud were charges of forged signatures, work that was never completed and inflated incomes of loan applicants who could not afford improvements. The scheme targeted the elderly, the poor, and the physically and mentally handicapped, the complaint charged.

Last year, nine home improvement salesmen were convicted in federal court of fraud involving home improvement loans through Atlantic Permanent. No officials of the lending institution were charged.

The lawsuit alleged that Willis W. Stephenson, who resigned in July 1982 as president of Atlantic Permanent, coached the dealers to cover up the illegal practice of offering cash rebates to lure customers into contracts.

Also named as defendants were Harry H. Knickerbocker, executive vice president for the loan division; and Warren P. Fisher, vice president in charge of the home improvement loan department.

Professor **Blakey**. The situation involved the Atlantic Permanent Federal Savings and Loan Association—prima facie a legitimate business—indeed, a bank, as the bankers previously here were. The allegation made against the bank in the Federal case was that during that period of time when the cash flow was tough several years ago, the bank decided to enter into a conspiracy with some home improvement loan contractors. And the nature of that conspiracy was to sell to the poor, the uneducated, the minority, the old, home improvements that they could not afford and did not need. That was done, and the inevitable occurred—foreclosures were brought on these people's homes. The situation got so bad that the FBI got interested in it. Indeed, the Department of Justice prosecuted and convicted some of the home improvement contractors. But the Government's case never focused on the bank; the Government's case was never carried to the bank or the bank's officers. Some private lawyers got into it, not using RICO; they represented some of the families, and they negotiated with the bank. The bank's response was, "We did nothing wrong. We were a victim," and then the bank litigated with that strategy called the blizzard. Papers were filed like snowflakes. The claims were on the average of $10,000 to $15,000 apiece. The lawyers who represented these people had to take the cases on a contingent fee. The victims were too poor; they had lost their homes; they had no money. And when the bank responded by massive paper filing, the private lawyers could not afford to stay into it. The cases went nowhere.

What eventually happened, however, was that a defense insurance firm in Norfolk—and it is very interesting; this is in Virginia, too—I do not know whether this is the home district of our previous witness—but it is in his State—a group of lawyers got into it on a pro bono basis and decided that, while they normally did defense work, this was a case that they ought to do for the little guy.

They called me and asked me if the case could be designed as a RICO case. They said they could not pay me, but if I would come in, I could throw my lot in with theirs, and we could see if we could do some good. We did. I designed a RICO case.

The underlying claim for the approximately nine families that we represented was about $115,000. To date, and the legal fee question is still outstanding, the firm has invested approximately $300,000 in the litigation based on its normal chargeable time. The bank also responded to our case with the same blizzard defense. The reason why goes to the heart of the need for RICO. The bank said the suit was frivolous. The bank took out newspaper ads to the effect that the case was libelous, interfering with a legitimate business. They filed a motion seeking sanctions against the lawyers involved, myself included. They then resisted every stage of the discovery. This is why it cost $300,000.

The suit, on the eve of trial, was settled. And it was settled on grounds that I cannot discuss here, because during the course of that discovery, we came up with the proverbial "smoking gun" that indicated that the bank people knew precisely what they were doing, that it was a matter of corporate strategy, and that part of that strategy was to defend against individual suits with this blizzard technique.

The Norfolk lawyers entered into, because it was in the best interest of our client, a confidentiality agreement as part of the settlement that we would make no statements about the suit, the bank would make no statements about the suit; all of the discovery would be withdrawn; our clients would be compensated, and the judge would determine the legal fees.

A bank officer, however, breached that agreement of confidentiality and made a statement in the public press to the effect—and I am quoting now—"From the beginning, I stated the suit was without merit, and I would say that the terms of the settlement reinforce that opinion."

When he did that, the lawyers in Norfolk brought that statement to the attention of the Federal judge; the Federal judge was outraged, that the confidentiality agreement was breached, and that it was materially misstated. He then called in the lawyers for the bank, required them to issue a public retraction, and then made public the terms of the settlement. And that is what the newspaper article covered.

Let me sketch for you what would have happened with that suit had the recommendations made before this hearing been accepted.

First, the criminal conviction question. Criminal convictions had been obtained against the contractors. But criminal convictions were not obtained against the bank or the bank officers. The contractors were basically bankrupt by the time the Federal Government had finished criminally prosecuting them. That means that even though this case could have been prosecuted as a Federal criminal RICO—hands down, it could have been; it was not; it was prosecuted as false statements in bank records case. But had it been prosecuted as a Federal RICO against the contractors, while these people would have been RICO victims, the ultimate perpetrator in this case, the bank and the bank officers, would have gotten off civilly, because the criminal convictions would not have been against those at the higher level, the ultimate people, in this case who are, in my judgment, the real "racketeers."

Let us also go down, Senator, your suggested series of amendments, two of which I think are, with all candor, misguided, and one of which I think hits home.

The first one would be "fraud-plus."

Was there any activity in this fact situation that was other than fraud? Answer: No.

Now, while this case could have been criminally prosecuted under RICO as amended by your bill, these people—and when I say the old, the blind, the poor, and the disadvantaged, I really mean that. In one case, an older black woman had her name forged to the contract that the bank ultimately foreclosed on her house——

Senator HATCH. Well, on that point, we would under my bill define "racketeering" as, among other thing, extortionate credit transactions. So you would still have——

Professor BLAKEY. Well, this was not an extortionate credit transactions offense. What they were was home improvement loans. The interest rate——

Senator HATCH. Well, but they were certainly made for the purpose of getting these people in a bind so they could foreclose on their property.

Professor BLAKEY. But the rate of interest, Senator, would not fall within the prohibition of either State or Federal usury laws.

Senator HATCH. Well, but I do not think you have to have usury involved if the intent of the contractors and the bank in consonance was to rob these people of their property by getting them involved in contracts that they knew they could not live up to.

Professor BLAKEY. Senator, I am sure that if we had the opportunity, we could go into the Federal extortionate——

Senator **Hatch**. And I have to admit, I want to cover your case—there is no question that I would like to see that covered, but you might have to admit that there are a lot of these cases have little merit or foundation warranting Federal jurisdiction and treble damages.

Professor **Blakey**. Well, let me go on with that, Senator.

I am sure we could go back and determine whether this falls within a RICO predicate. But based on my knowledge of Federal criminal law and the RICO predicate offenses, this fact pattern would not, if you put in a fraud-plus requirement. If I am wrong on that—and I am sure your staff could show me how——

Senator **Hatch**. I think you are, but if you are not, we ought to take care of it.

Professor **Blakey**. Fine. The second question is whether there was a racketeering injury here—that is, an injury other than the one from the basic fraud. The answer is there is not.

These were citizens, not competing businesses, so there is no competitive injury. There was no infiltration of their businesses, because they did not have a business; they were simply citizen victims. And the injury that they suffered was from the basic fraud itself. They had no special damages; they had only general damages. Consequently, even if there had been a criminal conviction, and you did not have the fraud-plus requirement, these people would have no distinct injury and no right to recover under RICO. They would be left to the remedies of State law, which clearly were inadequate in this context, particularly since they could not recover legal fees.

The third point that you make, Senator—and I think it is the one that, if I may echo what the attorney general said—that if there are problems here in some of these RICO cases—and I think there are—the great irony of it—and it just overwhelms me.

There are two principal objections to civil RICO. One is that it is misfocused, that is, it is not limited to organized crime; it hits "legitimate" businesses.

Two is that it is overbroad.

But the remedies that these people are suggesting to RICO fall within the same strictures that they are criticizing RICO for.

They are misfocused; that is, they are looking to the substantive scope of the statute, rather than at the procedural abuse; second is they are overbroad. They are overbroad in that they fall into what, in a law school class, I call the "some and all" fallacy—because some cases are abusive does not mean you eliminate all cases.

If there is a problem in this area—but I do not think it is RICO-specific—we ought to tailor our remedies to the nature of the abuses. If we have frivolous cases, the focus of the committee ought to be on the remedies that deal with frivolous cases.

Are the current Federal rules adequate to deal with the problem?

My own judgment is that they are, and in fact, they are doing it. Rule 9, rule 11, rule 26, rule 56, all with a careful administration by the judiciary, and we have that, will weed out the bad cases, and the ones that are not bad ought to go forward.

If Congress acts in this area, what it ought to do is to put some disincentives in the system against frivolous cases. That is why I like your attorneys fees provisions for frivolous cases. But, frankly, I do not think you go far enough. You ought to provide not only for attorneys fees, but also for costs, cost of litigation, and you ought to do to the frivolous plaintiff what the frivolous plaintiff would like to do to the legitimate defendant, that is, take him for treble damages.

If the defendant can show that a particular case is frivolous, that is, meritless, and it was brought for the purpose of inducing settlement, then I think he ought to be entitled to win that case like the bank case was won in Utah, under the little Utah RICO statute, and then recover treble damages for counsel fees and costs. Just as treble damages will inhibit fraud by perpetrators, I think treble damages will inhibit lawyers from filing frivolous litigation.

Senator HATCH. So you would include the lawyers as potential——

Professor BLAKEY. Absolutely, Senator. If there is a problem in the administration of this statute, it will in two kinds of lawyers. One kind of lawyer, the defense lawyer, overstates the threat that this statute represents, frankly, to scare his clients. I am sure you all know the famous saying, the lawyer's prayer, "Would that the Lord send me a scared, rich client."

Senator BIDEN. And if he doesn't send him to us, we are going to make him both.

Professor BLAKEY. Right.

A good deal of what you hear in cocktail party talk about RICO and, frankly, in statements before congressional committees, are advertisements by lawyers seeking alternative sources of employment. Securities cases are down, antitrust cases are down. They hope this is a new and fertile area to secure money for college tuition, which some of us from time to time, face.

The other side is the other kind of lawyer that overstates the promise of this statute. This statute is not a pot of gold for every lawyer. It is not as broad as some plaintiffs' lawyers would like to think. For example, you heard this morning that it overlaps all of securities and securities fraud.

With all due respect, both to Justice Marshall and your own statement, that is inaccurate. The statute specifically says "offense involving securities fraud." Consequently, it does not embody section 10(b)(5). It involves the criminal provision of the 1934 act, and when it embodies the criminal provision of the 1934 act, it includes a willfulness requirement.

Your illustration of an honest mistake in a prospectus does not fall within the statute.

Senator HATCH. No; I did not intend to make that statement as part of the RICO discussion. I was saying that I myself have some troubles with calling an error or omission in a prospectus "securities fraud."

Professor BLAKEY. It does not fall within RICO now.

Senator HATCH. No; I agree it does not fall within RICO.

Professor BLAKEY. In other words, there are different kinds of securities cases. Some of them are strict liability, and they are not within RICO. Some of them involve negligence, and they are not within RICO. The only securities fraud cases that fall within RICO are the ones where the government could have prosecuted a criminal case.

Senator HATCH. Sure.

Professor BLAKEY. And that requires willfulness, an intent to defraud.

You heard the statement made this morning that RICO is going to revolutionize business and commercial disputes. I think that is only true to the degree that the defense counsel currently defending these cases are unaware, frankly, of the existing Federal criminal jurisprudence.

In the mail fraud and wire fraud area, for example, good faith is an absolute defense, and you can establish good faith by showing advice of counsel. So if you have a takeover situation—and a good example is *Dan River, Inc.* v. *Icahn* (701 Fed., 278, 291 (4th Cir. 1903)), the case out of the fourth circuit, where a RICO suit was brought, but was dismissed at the appellate level, on the grounds that since Icahn had acted on advice of counsel, there was insufficient likelihood of Dan River succeeding on the merits.

One of the things that is happening in these cases—you hear of the floodgate—there are only 500 cases, max, 500 cases. And 65 percent of those could have already been in the Federal court. I know, too, of less than 10 that have gone to judgment.

Much of what you are hearing reflects is a "Chicken Little" attitude. The evidence is not in to determine whether these cases are legitimate or not. The *Atlantic Permanent* case is a legitimate RICO case, should have been brought, and it was possible, because we had a Federal forum, where we had an accelerated docket, it turns out, in Virginia, more so than in the State court system. We also had the right to secure legal fees. This case was not possible legally in the State system where these people had only a base claim of about $15,000 apiece, and the bank was defending with a blizzard defense. Unless the lawyers involved had the prospect of legal fees, this case was not an economically viable project. It was the fact of the treble damages plus the counsel fees, where there was underlying merit in the case, that led the bank to settle. Those people who are coming before you and telling you that the existence of the racketeer label and the treble damage clause induces unjust settlements are either fooling you, or fools themselves. No careful manager of corporate funds or other funds settles a meritless suit, a frivolous suit, for more than its settlement value because of the nature of the underlying complaint—be it antitrust, be it securities, be it RICO. It is only worth the cost of settling it.

Senator HATCH. I, personally, know that is not true. As a litigator, I have seen all kinds of people who are willing to do anything to get rid of an epithet that they felt was——

Professor BLAKEY. But do they settle it at a price higher than they would have settled it had it been brought under some other statute?

Senator HATCH. No question about it. Some of them, I have said to them as an attorney, "My gosh, you can win this thing, you must win this thing. The law is on your side."

"Well, I cannot stand to be called a racketeer. I cannot stand to be called a securities defrauder," or whatever it is.

But I suspect there are a lot of suits settled because of the intimidation effect.

Professor **Blakey**. Senator, my experience is almost the reverse. I have dealt—and I am not free because of the lawyer-client relationship to identify them—with banks.

Senator **Hatch**. Well, I do not know about your experience, but I have been in thousands of cases, and I can tell you, I can name a number of them where they settled rather than go through the ignominy of the trial—and of course, it involved a lot of other considerations as well—attorneys fees, the cost of the trial, the ignominy that came from the epithets in the complaint, the ability to get rid of a problem that was consuming valuable time and resources. I mean, there are a lot reasons people settle cases, and they are not all justifiable reasons.

Professor **Blakey**. Well, some of the banks I have worked with have had the following attitude. As long as the racketeer label is in the case, even though this case should be settled, either on the merits or for the settlement value of the suit, we won't settle, as long as the racketeer label is there.

Senator **Hatch**. Well, I think there are those who take that attitude.

Professor **Blakey**. Pull the racketeer label out, and we will discuss it with you normally.

I think that if you hear of extortionate settlements from people, Senator, get examples to find out what the evidence was on the plaintiff's part as well as the defendant's part, and my guess is those settlements in the RICO area will not be terribly different than the settlement experience——

Senator **Hatch**. That is probably true. As people get so that they understand this does not really involve racketeering, but involves another way of getting damages, that may be so, as people mature and get more used to a litigious society. Yet treble damages and Federal jurisdiction is more than compensating for an injury under State law in State court.

But put yourself in the shoes of doctors or lawyers or accountants who are sued for malpractice. I hate to tell you this, but I suspect an awful lot of those cases are resolved. And I used to defend doctors in medical malpractice cases that were resolved solely because the doctor does not went to go through the subsequent ignominy of having the possibility that there might be a verdict in a malpractice case—in cases where I felt he had a total defense.

Professor **Blakey**. But then, Senator, what is the remedy in dealing with those cases, if you assume that they should not have been settled and they should have been tried, in redrafting the statute so that you can protect the sort of——

Senator **Hatch**. Well, you know, there are differences in context, but I only cite that as an illustration that people do settle lawsuits out of fear and intimidation and because of nerves and because of problems that do not have any relationship to liability. Now, many times, they settle because they are afraid of exposure or liability. But there are all kinds of reasons.

I am saying it is simplistic to say across-the-board that banks are going to take it to court if they have not been a racketeer or they have not done anything wrong. I guarantee you, an awful lot of suits, and the vast majority of them, are settled where there is little chance of liability, but just because of a number of these subjective factors that enter into people's lives. I have seen people who would settle anything because they did not like the idea of being sued, even though they were right.

Professor BLAKEY. Then I suppose in the end, what we must balance off is the rights of the timorous defendant who settles suits that should not be settled against the wrongs of the victimized plaintiff who need the ability to sue.

Senator HATCH. Well, no, no, there may be the extortion of lawsuits today in our society. You know, as a former litigator, I just have to tell you that there is no question in my mind that there are a lot of lawsuits filed that should never be filed where they are going to get nuisance settlements, just because it is cheaper to settle them for nuisance value than it is to pay the defense costs—or, where people have been highstrung or upset or worried about the ignominy that comes from being accused of things that they have never done. You know, there are 101 reasons why. Some of them are that they are guilty. Sometimes they are wrong, like in the case of the bank that you cited, but that is just one isolated case.

Senator BIDEN. Would the Chairman yield on that point for a moment?

Senator HATCH. Sure.

Senator BIDEN. I think the point the Chairman is making is a good one, but it is a basic problem in the law.

Senator HATCH. Well, it is.

Senator BIDEN. I got here when I was 29, so although I was a litigator, I only did it for 4 years, but I was on the other side. I was the guy who was trying to represent that person who the scalpel was left in his stomach. And what I found is that the same thing occurs. You will find that plaintiffs will not go forward because of the blizzard of discovery that comes out; you have to sit there with your client when he asks, "Well, how much is this going to cost me notwithstanding the fact you are taking a contingency fee?"

I say, "Well, I know the law firm, I know the corporation. It is probably going to cost you merely in discovery, $8,000 to $10,000, dealing with these people."

And the plaintiff sits there and says, "I've got a case."

And I say. "You do have a case."

And they ask, "Well, will you put up that money?"

And I was just like most lawyers starting off, and I would have to say, "I don't have $10,000. I will take it, but you will have to pay the costs as we go along."

I do not know how many clients at that point with legitimate cases stood up and said, "I just can't do it."

So the point you make is a valid one, and it is valid on both sides. But it seems to me that if we focus on the difficulty that is inherent in the system as a consequence of the cost of pursuing a legitimate claim and/or the social or political cost of defending one, we are going to come up with a justification to suggest that by noting the exceptions, we should not have any laws.

Senator HATCH. I agree with everything that Senator Biden has said; I do not differ with one word he has said, and I agree with much of what you have said. But add into that the greedy lawyer who is looking for any kind of a lawsuit he can bring, right or wrong, who makes lawsuits out of things that are not lawsuits, and then you get into why banks do not like to be called racketeers when they do not have a pattern of racketeering activity, or why an insurance company does not want to be accused of racketeering because they refuse the claim because of a misstatement in the application form, or any number of other reasons.

Professor **Blakey**. Then, Senator, let me make two last points, and let my compatriots go on.

One of the things I think we have to do in looking at these complaints about RICO litigation is to ask whether this is a RICO-specific problem. And I think frivolous litigation is not RICO-specific, and that the whole burden of such litigation on the Federal courts of frivolous litigation in the malpractice area against accountants, against doctors, lawyers, or prison officials, ought not to be seen as a RICO-specific question.

The second one, Senator, is I hope that we can tailor the remedies here to the character of the wrong.

And I am not one that is going to defend too much litigation or too many lawyers, although I happen to be a law professor and have a stake in the venture.

Let's keep our reforms focused. Let's not give anybody, because they drink Perrier water and play golf at the country club, a kind of "by" under RICO that we would not give to the guy who drinks a beer, a six pack, and bowls on the weekend.

Let us not talk about legitimate businesses who do not like to be called racketeers without also talking about union officials who do not like to be called racketeers.

And if the problem is the label, "racketeer," the remedy is real simple—take the label off of RICO, but let's leave the substance there.

The truth of the matter is RICO was not the first Federal statute to have a racketeer label. The Antiracketeering Act in 1934 contained the label——

Senator **Hatch**. We just passed one last year.

Professor **Blakey**. It was a general extortion statute that has been applied to cops, public officials, across the board. It has not been limited to racketeers.

The interstate travel in aid of racketeering statute, the travel act that went through under the Kennedy administration, has the word "racketeer" in it.

And when Senator McClellan asked me, as a staff person, to change the name of RICO to parallel these other statutes and put "racketeer" in. I will have to say as the person who drafted it, I had no inkling that putting the racketeer language in the civil case would cause the trouble that it has.

In fact, if you go back and look at the dictionary definition of "racketeering" in 1970, it said, "to run a business by a pattern of extortion or fraud." Ironically, the committee only adopted in the statute the dictionary definition of "racketeer." Since that time, the godfather image has spread now, and a wholly different connotation is present. But if that is the problem, then leave the substance of the statute alone, and take the word out.

Senator HATCH. Well, I think that is what we are trying to do with the bill, S. 1521. It leaves in place treble damage remedies, attorneys fees, incentives to bring suit, and Federal jurisdiction for civil RICO suits. Moreover, it continues to prevent mail, wire, and securities fraud that form the basis for a private RICO suit, as long as they are coupled with some other racketeering activity.

Professor BLAKEY. But that means it would not be operative in a basically fraud-only case, like *Atlantic Permanent.*

And there are a substantial number of fraud-only cases—even, for example, by true racketeers. The *Westchester Premier Theater,* litigation (624 Fed. 1118 (2d cir.), cert. denied, 4490.7.871 (1981)) for example——

Senator HATCH. Well, you have to admit that RICO was brought for the purpose of genuine racketeering activity.

Professor BLAKEY. Senator, there are two issues involved on this point—what was intended in 1970. That is a historical question and a legal question. The historians are going to debate that until the ink runs dry. The legal question has now been settled by the Supreme Court. The second point, the issue that faces this committee, not this court, is what should the statute be today. And what happened in 1970 is irrelevant to that; the real question is what you ought to do today.

Senator HATCH. Oh, I agree.

Professor BLAKEY. But I will tell you, Senator, that in fact, if you read the legislative history, objections were made in the Senate by the late Senator Hart, God rest his soul, and Senator Kennedy, that the statute was not limited to organized crime. And Senator McClellan took the floor and answered at length that the 1970 act is not limited to organized crime. While the occasion, the impetus for its drafting was organized crime, it was general reform in each of its titles

Precisely the same point was made in the House by Congressman Conyers and Congressman Mikva, in the committee report and later on the floor. Congressman Poff responded to them by saying while organized crime was the occasion for the enactment of the statute, none of its titles—title I the grand jury section, title II on immunity, the works—they were not limited it to organized crime. The 1970 act was intended to be general reform.

Senator HATCH. Well, I think that is clear, but I think they would be shocked to find the way it is being approached today.

Now, something has to be done. I am concerned about the stigmatizing effect that a charge of racketeering could have on legitimate businesses. I think anybody would have to be concerned.

Professor BLAKEY. Take the label off, Senator.

Senator HATCH. All right. You may have a good suggestion there, and we tried to do that in the bill that I have filed. You make another suggestion, that our bill does not take care of the ordinary fraud cases, but I have to believe that the State laws do. But you have indicated, at least in this one banking case, that that may not have been the situation. So we are going to study it, and we will look at it.

You have raised a lot of interesting questions.

Professor BLAKEY. Senator, I would be glad to work with you or your staff, and go over the possible impacts——

Senator **Hatch**. My desire is not to make it easier for people to escape liability. It is just that I do not want to have unjust lawyer-brought frivolous suits that work the other end of that equation in an improper fashion, as well, and a lot of legitimate businesspeople feel that way today, and I think rightly so.

Let us turn to the Honorable Stephen D. Neely, who is county attorney, Pima County, Tucson, AZ, and then we will hear Mr. Philip A. Feigin, who is the assistant securities commissioner of the Colorado Division of Securities.

[The statement follows:]

Statement
of

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. Chairman, Members of the Committee, our testimony today is given on behalf of the National Association of Attorneys General and National District Attorneys Association.*

The National Association of Attorneys General was founded in 1907 for the purpose of fostering communication and cooperation among the state's chief legal officers and their staffs. Since then, the Association has served as a clearing house of information, provided research and technical assistance, and has conducted analysis of policy and legislative issues pertaining to law and law enforcement.

The National District Attorneys Association is the national service organization for our country's local prosecutors. It exists solely for the improvement of the attorneys representing the public through educational and informational assistance.

Representing the chief legal officers of the states and the local prosecutors, we testify today in response to the Chairman's questions concerning civil RICO raised in early January of this year. These hearings take on special meaning in light of the recent decisions of the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., Inc., 53 U.S.L.W. 5034 (U.S. July 1, 1985) and American National Bank and Trust Co. of Chicago v. Haroco, Inc., 53 U.S.L.W. 5067 (U.S. July 1, 1985).

I

Federal RICO creates three substantive prohibitions:

(1) investing in an "enterprise" with the proceeds of a "pattern of racketeering,"

(2) acquiring an "enterprise" by a "pattern of racketeering," and

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*The assistance of Professor G. Robert Blakey of the Notre Dame Law School and Keith Caughlin (N.D.'85) is hereby acknowledged.

(3) operating an "enterprise" by a "pattern of racketeering."

(18 U.S.C. § 1962 (1982)).

"Enterprise" is defined to include corporations, unions, governmental units, and licit and illicit associations. (18 U.S.C. § 1961(4) (1982)).

"Pattern of Racketeering" is defined to include offenses dealing with:

(1) personal violence,

(2) the provision of illegal goods and services, that is, drugs, prostitution, etc.,
(3) corruption in private (corporate and union) or public life, and

(4) various forms of criminal fraud.

(18 U.S.C. § 1961(1) (1982)), amended by Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 901(g), 1020, 98 Stat. 2136, 2143; Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, Title II, § 205, 98 Stat. 2770).

The statute itself imposes criminal sanctions on violations of its substantive prohibitions:

(1) imprisonment and fine (20 years and $25,000), and

(2) criminal forfeiture of:

(a) proceeds of transactions,

(b) bases of power.

(18 U.S.C. § 1963 (1982)), amended by Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192).

In light of the Criminal Fine Enforcement Act of 1984, the fine may also be:

(1) $250,000, if an individual is convicted,

(2) $500,000, if other than an individual is convicted, or

(3) twice the loss or twice the gain.

(Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 6(a), 98 Stat. 3137) (to be codified at 18 U.S.C. § 3623(a)(3), (b)(3), or (c)(1)).

The rights of innocent parties, that is, those without knowledge, and victims are explicitly protected.

The statute authorizes civil injunctive suits against those who engage in racketeering; it also authorizes civil

(3X) damage suits against those who engage in racketeering. (18 U.S.C. § 1964 (1982)), amended by Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, § 402(24)A, 98 Stat. 3359).

Since 1970, similar legislation has been enacted in 22 states. Attached to this statement as Exhibit "A" is a comprehensive analysis of federal RICO and the state statutes. RICO legislation is also currently pending in a number of other states.

The federal statute and its state counterparts have been successfully employed in a variety of organized crime, United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982) ("members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling and loansharking."), political corruption, United States v. Mandel 602 F.2d 653 (4th Cir. 1979) (Governor of Maryland), cert. denied, 445 U.S. 961 (1980), and white collar crime prosecutions, United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) (Japanese corporation: fraud and bribery). They have also been employed successfully against violent groups generally, including outlaw motorcycle gangs, United States v. Watchmaker, 761 F.2d 1459, 1463 (11th Cir. 1985) ("Outlaw Mortorcycle Club"); United States v. Rubio 727 F.2d 786, 790 (9th Cir. 1983) ("Hells Angels Motorcycle Club"), and terrorists groups United States v. Bagaric, 706 F.2d 42 (2d Cir.) (Croatian nationalist terrorists), cert. denied, 104 S.Ct. 283 (1983). Increasingly, their civil provisions have also been successfully used at the federal and state level by the federal government as well as by state and local units of governments victimized by conduct prohibited by RICO. See, e.g., Federal Deposit Insurance Corp. v. Hardin, 608 F. Supp. 348 (N.D. Tenn. 1985) (bank fraud); State of Okla. ex rel. Department of Human Services v. Children's Shelter, Inc., 604 F. Supp. 867, 870-71 (W.D. Okla. 1985) (medicaid fraud); Comm'n. v. Cianfrani, 600 F. Supp. 1364, 1368-69 (E.D. Pa. 1985) (treble damage award against state senator for "ghost" workers); Anchorage v. Hitachi Cable Ltd., 547 F. Supp. 633 (D. Alaska 1982) (bribery of purchasing agent). At the state level, RICO has been most successfully implemented in Florida, Arizona, Oregon, and New Mexico.

Since 1979, when the present Florida program was instituted in the Attorney General's office, for example, 32 civil RICO cases under Florida law have been brought, most often in conjunction with criminal prosecutions instituted by the offices of states attorneys. Actual cash recoveries exceed $7.3 million. Judgments for additional amounts have been obtained and are being pursued. Forty-four cases are pending; 75 investigations are underway. Most often, the Florida RICO Act has been used in the areas of controlled substances, but it has also been successfully used against the economic bases of pornography, prostitution, gambling, theft, and fraud enterprises.

The record of the present program in the office of the Arizona Attorney General is similarly impressive. More than 75 Arizona criminal or civil RICO cases have been brought. Civil judgments have obtained in excess of $16 million and collections made of $329,000. Other assets secured exceed $5 million. Criminal prosecutions have sought over $1.5 million; fines and cost assessed exceed $800,000. The suits have included "named" organized crime figures. Most recently, the Arizona office obtained the conviction and long term incarceration of Joseph Frank "Papa Joe" Tocco, the brother of Albert Tocco, one of the principal leaders of the Chicago syndicate. Hearings before the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Organized Crime in Chicago, 98th Cong., 1st Sess. 186 (1983). In addition, it obtained a civil RICO judgment, amply secured by seized assets, of $1.5 million dollars against Tocco.

For criminal prosecutions, see, e.g., Carlson v. State 405 So.2d 173, 174 (Fla. 1981) (house of ill fame); Dorsey

v. State, 402 So.2d 1178, 1180 (Fla. 1981) (drugs); State v. Whiddon, 384 So.2d 1269, 1270 (Fla. 1980) (theft, burglary, arson, and arson to defraud); Moorehead v. State, 383 So.2d 629, 630-31 (Fla. 1980) (auto theft). For civil actions, see, e.g., Arizona ex rel. Corbin v. Pickrell 136 Ariz. 589, 591, 667 P.2d 1304, 1306 (1983) (securities fraud); Banderas v. Banco Central del Ecuador, 461 So.2d 265 (Fla. Dist. Ct. App. 1985) (foreign exchange fraud).

The federal statute has also played a major role in the interpretation of state legislation. See, e.g., Baines v. Superior Court, 688 P.2d 1037, 1040 (Ariz. Ct. App. 1984) ("[i]n the absence of any Arizona cases, we will look to federal decisional law for guidance"); Roush v. State 413 So.2d 15, 20-21 (Fla. 1982) (constitutionality of RICO-type civil remedies upheld relying on federal decisions); Moorehead v. State, 383 So.2d at 630-31 (constitutionality of "pattern" in Fla. RICO statute upheld relying on federal decisions.)

Other states and localities are also moving to implement their state legislation as well as to bring federal suits. We invite this Committee, therefore, to study these enforcement programs as part of its hearings.

The National Association of Attorneys General and the National District Attorneys Association support the basic RICO concept. Both the National Association of Attorneys General and the National District Attorneys Association have passed resolutions dealing with RICO. These are attached to this statement as Exhibits "B" and "C". Both groups oppose all efforts to weaken RICO. They support efforts to clarify or strengthen it.

II

The Chairman of this Committee in January raised a question dealing with the propriety of the use of RICO in the business fraud context. He expressed the concern that RICO might be used unfairly as a business weapon. We share his concern, but do not believe that the evidence bears it out. In addition, we believe that present remedies against the possibility of vexatious litigation are adequate to curtail abuse. Nevertheless, we make suggestions for fine-tuning RICO and creating a treble damage remedy for victims of improper RICO litigation.

The current controversy over RICO has not centered on its criminal provisions or its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of governmental entities or unions. Indeed, Congress has shown its support for the RICO concept most recently in the passage of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), which extensively rewrote its criminal sanctions, strengthening its forfeiture provisions and adding a number of new predicate offenses. Instead, the controversy has focused almost exclusively on private suits brought in the commercial fraud area.

Special pleas, particularly by segments of the accounting and securities industries, are now being heard that suggest that it is outrageous to bring "racketeering" charges against "legitimate" business people. The dictionary, however, defines a "racket" as a "business run by fraud or extortion" and a "racketeer" as one who runs a "racket." American Heritage Dictionary, 580 (Dell ed. 1970) If "legitimate" business people violate RICO's terms, they ought to be called "racketeers." No justification can be offered for limiting the term "racketeer" - or RICO - to those whose names end in vowels. Congressman Richard Poff, one of RICO's principal sponsors in 1970, put it well: "[E]very effort was made to produce a strong and effective tool with which to combat organized crime - and at the same time deal fairly with all who might be affected by . . . [the] legislation - whether part of the crime syndicate or not." 116 Cong. Rec. 35,204 (1970).

Dire predictions are also being made of an unjustified flood of new federal litigation, as if litigation of any proportion would be unjustified, if the victims could establish their allegations. Voices cry out most stridently that RICO is anti-business. Nothing could be more self-serving - or further from the truth. Former Treasury Secretary, W. Michael Blumenthal, put it well," [T]he misbehavior of a large corporation makes news because the majority do not misbehave [but those who are] ethically strong and morally clean [should be the first to denounce those who are not for they] threaten the survival of the free enterprise system." Subcommittee on Crime, House Judiciary Comm., 5th Cong. 2d Sess., *White Collar Crime: The Problem and the Federal Response* 15 (Comm. Print 1978). That major corporations do engage in illegal practices, however, cannot be seriously questioned. A survey of 1,043 major corporations between 1970 and 1980 indicated that 117 had significant convictions or consent decrees for 98 antitrust violations; 28 cases of kickbacks, bribery, or illegal rebates; 21 instances of illegal political contributions; 11 cases of fraud; and 5 cases of tax evasion.

Legitimate business people, in fact, have little to fear from federal or state RICO legislation. Neither makes criminal that conduct which is not *now* already criminal under its predicate offenses. Both merely provide enhanced sanctions and new civil enforcement mechanisms. Legitimate business people do not perpetrate fraud; they are victimized by it. Good faith commercial disputes, moreover, do not constitute *criminal* fraud. Nothing in RICO provides to the contrary. *See*, *e.g.*, *Durland v. United States*, 161 U.S. 306, 314 (1895) (good faith defense to mail fraud); *United States v. Martin-Trigona*, 684 F.2d 485, 492-93 (7th Cir. 1982) ("[G]ood faith, or the absence of an intent to defraud, is a complete defense to a charge of mail fraud"). The opponents of RICO legislation object, in effect, to the *effective* enforcement of *present* law.

While it may be that some RICO suits have been brought by unethical plaintiff's lawyers hoping to obtain quick settlements by the filing of strike suits, that characterization may not be made of all, or most, RICO litigation. Major corporations that have sued under RICO, for example, include I.B.M., Crocker National Bank, Standard Oil of Indiana, Armco Steel, Pepsi-Cola Bottling Company, Banker's Trust Co., Aetna Casualty and Security Co., Allstate Insurance Co., and State Farm Fire and Casualty Co. I.B.M., for example, sued Hitachi, Ltd., under RICO for the theft of computer software; the suit was settled for upwards of $200 million. Similarly, the Crocker National Bank litigation against Lehman Brothers, Rockwell International, and Singer, Hunter, et al., a law firm, involved in $225 million computer leasing fraud; it was settled for $65 million.

No one knows how much fraud is practiced against the federal government in the defense contract and procurement area. A generally accepted estimate does not even exist. That the figure must be enormous, however, is underlined by the recent guilty plea of the General Electic Co. to defrauding the Pentagon on its Minuteman missile contract. Other investigations involving G.E. are pending. Similarly, the General Dynamics Corporation, another of the nation's largest defense contractors, has acknowledged giving Admiral Hyman Rickover over $67,000 in "gratuities" between 1961 and 1977. Secretary of the Navy, John F. Lehman Jr., recently suspended all new contracts with the Corporation because of "pervasive" business misconduct. In addition, the Inspector General of the Pentagon recently informed Congress that forty-five defense contracting firms are under investigation. The allegations against 9 of the top 10 largest defense contractors include: cost mischarging, labor mischarging, subcontractor kickbacks, product substitution, security compromise, defective pricing, cost duplication, false claims, supply accountability, gratuities, bid rigging, and bribery. See Exhibit "D".

Similar problems exist with fraud practiced against state and local governments in the contract procurement area. For example, the McDonnell Douglas Corporation, the nation's top defense contractor, with $7.7 billion in business last year, is not only under investigation by the federal government, as noted above, but is also the subject of a suit by the State of Arizona. The suit alleges improper billing and accounting practices by its accounting practices by its computer system's division, MCAUTO, including cost mischarging, underbidding, and transferring costs that are not reimburseable to contracts with the State of Arizona.

A general estimate of fraud--both by insiders in the government and recipients of benefits--in other government benefit programs is, however, put at $2.5 to $25 billion. Specialized estimates of individual programs make the higher figure more likely. Medicaid beneficiary fraud, for example, is put at $1.2 billion; medicaid provider fraud amounts to $715 million. Medicare fraud amounts to $1.5 billion. The scope of corruption in government may also be inferred from the record of federal prosecutions from 1975 through 1984, which indicates that 6,906 individuals have been indicted and 5,822 individuals have been convicted for corruption. Others are waiting trial. Corruption charges have been leveled and upheld against all manner of office holders at each level of government, federal, state and local, and in all branches of government, executive, legislative and judicial. That this record represents only the tip of the iceberg seems clear. A General Accounting Study in 1980 tragically concluded, "Most fraud [against the government] is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is that crime against the Government often does pay." U.S. General Accounting Office, Fraud In Government Programs - How Extensive Is It? - How Can It Be Controlled iii (1980).

We believe that the federal government and its instrumentalities are "persons" within RICO and that they could sue for treble damages to their "business" or "property." Nevertheless, we recognized that it might be held that, in light of antitrust precedent, the government itself is not a "person" within RICO, United States v. Cooper Corp., 312 U.S. 600, 614 (1941), although a government corporation might be protected by the act, United States v. General Electric Co., 209 F. Supp. 197, 205, 207 (D.C. Pa. 1962) (Tennessee Valley Authority). Accordingly, we support a clarifying amendment to the statute that would assure that RICO would be an important antifraud weapon civilly in the hands of the federal government. Suggested language to achieve that objective is attached to this statement as Exhibit "E".

More generally, fraud is estimated to cost the nation's business and individuals upwards of $100 billion each year. Securities theft and fraud costs $8 billion. Movie piracy costs $1 billion. Records and tape piracy costs $400 million. Commodities investment fraud costs $200 million. Recent investigations indicate that as much as $100 million may have been bilked from buyers of mobile homes, many of which were federally insured. Bank fraud, particularly by insiders, is also deeply disturbing. In the 1980-81 period, the failure of 105 banks and savings and loans cost one billion dollars. Roughly one-half of the bank failures and one-quarter of the savings and loan collapses had as a major contributing factor the criminal activities by insiders, few of whom, according to the findings of a study by the Barnard Committee, were adequately sanctioned, criminally or civilly. Last year that Committee noted:

> Despite such enormous losses, neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud. The few insiders who are singled out for civil sanctions by the banking agencies are usually either fined de minimis amounts or simply urged to resign. The few who are criminally prosecuted usually serve little, if any, time in prison for thefts that often cost millions of dollars. Committee on Government Operations, Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions, H. R. Rep. No. 1137, 98th Cong., 2d Sess. at 5 (1984).

Most banks in fact do not have the financial resources or the expertise to protect themselves from sophisticated schemes to defraud. According to recent testimony of the

Federal Deposit Insurance Corporation before this Committee, 97% of the federally insured banks have assets of less than $500 million; 84% less than $100 million; 66% less than $50 million.

Ultimately, many of these costs of fraud are passed on to the rest of us. Insurance fraud, for example, annually costs $11 billion, and since the typical insurance company must generate $1.25 in premiums for every dollar it pays out, the bill that the nation must meet amounts to $13.75 billion. Much insurance fraud, too, is systemic. In Southern California alone, it is estimated that some 40 insurance fraud rings, run by crooked lawyers and doctors, bilk the insurance industry out of $200 million a year. While the costs of vexatious litigation is also generally spread throughout society by directors and officers liability insurance, too often the costs of fraud are not shared through various kinds of insurance, and they rest on the shoulders of the victims, who can ill-afford to carry or sustain them. Indeed, in light of Ohio's experience with the failure of E.S.M. Government Securities, Inc., including a paid-for false audit report, and the repercussions in the savings and loan industry and on the gold market, no one ought seriously to contend that such fraud is a "garden variety" problem that may be "weeded" with business-as-usual legal techniques. Those individuals exist, of course, who would agree with the 18th century caveat emptor philosophy expressed by Justice Dennison in Queen v. Jones, 91 Eng. Rep. 330, 1 Salk. 379 (1704): "[W]e are not to indict one man for making a fool of another." But that day has passed. Modern notions of consumer protection have made that attitude outmoded.

The Second Circuit in its Sedima opinion suggested that it was "extraordinary if not outrageous" to bring a civil RICO suit against legitimate businesses; the court cited among its examples of such legitimate businesses, E. F. Hutton & Co., 741 F.2d 482, 487 (2d Cir. 1984). The recent guilty plea of E. F. Hutton to illegally overdrawing its bank accounts by more than $10 billion (obtaining a free ride averaging $150 million a day) indicates how unwise the Circuit Court's illustration was. Justice White in the Supreme Court's *Sedima* decision (53 U.S.L.W. at 5039) put it well: "'[L]egitimate' . . . enterprises . . . enjoy neither inherent incapacity for criminal activity nor immunity from its consequences."

Treble damage suits under RICO promise remedial relief against such outrageous conduct that will be swift, sure, and severe, characteristics deemed essential by modern economic analysis. *See generally* R. Posner, *Economic Analysis of Law* § 7.2 (2d. ed. 1977). Professor (now Judge) Posner suggests that modern economic analysis supports private enforcement mechanisms of more than actual damages against deliberate anti-social conduct, particularly where the factor of concealment is present. *Id.* at 462 (private enforcement; 143, 272 (more than actual damages for deliberate conduct); 235 (concealment). If our society authorizes the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, it lets the perpetrator know that if he is caught, he need only return the misappropriated sums. If he is not caught, he may keep his ill-gotten gains, and even if he is caught and sued, he knows that he may be able to defeat part of the damage claims or at least compromise it. In short, the balance of risk under traditional simple damage recovery provides little disincentive to those who engage in such conduct. Indeed, the Seventh Circuit was closer to the mark when it observed in *Haroco* that "the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs claims without facilitating indefensible windfalls." 747 F.2d 384, 399 n. 16 (7th Cir. 1984), *affirmed*, 53 U.S.L.W. 5067 (U.S. July 1, 1985).

In fact, if suits are settled at too low a figure, the deterrent impact of the damage claim will be undermined. See generally Block, Nold, and Sidak, The Deterrent Effect of Antitrust Enforcement, 89 Journal of Political Economy 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose [. . .] a credible threat to colluding firms. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . ."). Similarly, studies of the antitrust statutes show that most antitrust suits are settled now at close to actual damages. Ironically, it may be necessary to authorize treble damages to assure that deserving victims receive actual damages in the RICO area.

Public enforcement with its principal reliance on the criminal law cannot be relied upon to do the whole job of policing fraud. We must be candid about the limitations of the criminal justice system in the white collar area. Resources available for investigation and prosecution are scarce. The common law criminal trial is ponderous. The cases are complex. Offenders will be most often treated as "first offenders" even if they had actually engaged in a pattern of behavior over a substantial period of time. A few convictions will yield only a minimal deterrent effect. J. Conklin, Illegal But Not Criminal: Business Crime in America 129 (1977) rightly concludes:

> [T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost non existent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend toward more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and inspectors who seek compliance with the law rather than punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen. This failure to punish business offenders may encourage 'feelings of mistrust toward community morality, and general social disorganization' in the general population. Discriminatory justice may also provide lower class and working class individuals with justifications for their own violation of the law, and it may provide political radicals with a desire to replace a corrupt system in which equal

> justice is little more than a spoken ideal. (citations omitted).

The funding of the Securities and Exchange Commission, for example, has increased since 1979, but its staffing has decreased, and its pending investigations are down. Yet the number of shares traded on the New York Stock Exchange has shot up 300% since 1977; the number of first time registrants has increased by 260%. Even among legitimate brokerage firms, the incentive structure for commissions encourages a fraud known as "churning," trading stock without regard for investment objectives. Similarly, the futures industry in the United States has grown tremendously in recent years. The 139.9 million futures contracts traded in 1983 represents a level of trading activity 15 times greater than that reached in 1968. The value of contracts traded exceeds $5 trillion a year. Nevertheless, the resources of the Commodities Futures Trading Commission have remained relatively constant. Some would suggest that the industry is a scandal waiting to happen, for the Commission "is thoroughly out-gunned in the ongoing battle against commodity fraud." Senate Comm. on Governmental Affairs, Commodity Investment Fraud, S. Rep. No. 97-495, 97th Cong., 2d Sess. 10 (1983). In addition, accounting firms, once thought to play the role of outside watchdogs, are under heavy competitive pressure to go along with questionable annual reports, and they are increasingly losing their independence, since they also offer management consulting advice, as the testimony before the Dingle Committee so amply shows. The need for more effective deterrent to fraud in the world of legitimate business is, therefore, manifest.

Clearly, fraud - of all types - is a national problem that belongs, not only in state courts, but also in the national courts, along with price fixing, copyright infringement, and related business offenses. Dante persuasively suggests that crimes of fraud are, in fact, worse than crimes of violence, "because fraud is the proper evil of man, it more displeases God. And therefore the fraudulent stand below; and greater pain assails them." Inferno, Canto 11, 25-27. Civilization requires trust. Fraud undermines it. No civilized society can lightly tolerate it. No less than the integrity of the free enterprise system is at stake.

The perspective of history in the area of antitrust and securities regulation is enlightening. Congress passed the Sherman Act in 1890, principally to attack the oil, tobacco and sugar trusts, but it applied to all contracts in restraint of trade, not just those entered into by the Rockefeller family in connection with the founding of the Standard Oil Company. In addition, it was not until the era of the New Deal that the private enforcement mechanism of the antitrust statutes began to come into its own. Today, if our markets are free, it is principally because of private enforcement. Between 1960 and 1980, of the 22,585 civil and criminal antitrust cases, 84% were instituted by private plaintiffs.

The promise of the statute was, however, only slowly redeemed. It took until 1910 for the government to bring and the Supreme Court to uphold the breakup of the Standard Oil monopoly. Standard Oil Co. v. United States, 221 U.S. 1 (1910). The thrust of scholarly analysis of the Act's history places that disuse at the door of judicial hostility inflamed by the business community itself.

The historical parallels under RICO are haunting; the government only recently has brought a prosecution under RICO to break up the commission headed by the five families of organized crime in New York City, although the Commission and its membership, including 5 of 9 of the defendants in the 1985 indictment, were described and named in the 1969 Senate report on RICO. S. Rep. No. 91-617, 91st Cong., 1st Sess. 38-42 (1969).

Judicial hostility toward civil RICO, too, is widespread. It is also not without historical precedent. Congress in fact put the liberal construction clause in RICO in 1970 in an effort to avoid it. While a liberal construction clause is unique in federal law, it is not unique in state law. It had its origins in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the far-sighted code he drafted for Louisiana between 1820 and 1825. *I. E. Livingston, Complete Works on Criminal Jurisprudence* at 231 (1873 ed.) and II, *id*. at 14 ("all penal laws whatever are to be construed according to the plain import of their words . . . ."). Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. *The Code of Penal Law* at 5 (1865 ed.) ("fair import"): *The Code of Criminal Procedure* at 471-71 (1850 ed.) ("liberal construction"). He noted that the old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered, seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous." *Id*. Judicial hostility to change through legislation was common in the 19th century. W. Hurst, *The Growth of American Law* at 186 (1950) observed:

> [I]n the late nineteenth century, judges were not inclined to look favorably on legislation . . . [that] changed doctrine which judges had made the law of the land. x x x [W]here they were not ready boldly to declare . . . [it] unconstitutional, [they were ready] . . . to interpret it so restrictively as to narrow its effect. These factors found expression in the abstract cannons of statututory interpretation . . .: strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages . . . . The effect was to put a primarily obstructive if not destructive connotation on the process of statutory interpretation.

Indeed, legislatures reacted; "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, Roscoe Pound: Philosopher of Law at 174 (1974); see also E. Patterson, Jurisprudence: Men and Ideas of the Law at 421 (1951). In fact, a majority of states today has abolished the common law rule of strict construction either by expressly abrogating it or adopting some variation of "fair import" or "liberal construction." See also Tarrant v. Ponte, 751 F.2d 459, 466 (1st Cir. 1985) (rule of lenity not of constitutional force). Judicial hostility has, nevertheless, continued into the 20th century under RICO. See e.g., Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1305 (D. Col. 1984) (treble damage strictly construed); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 83 (W.D. N.Y. 1982) (derogation of common law strictly construed). See also Berg v. First American Bankshares, Inc., 599 F. Supp. 500, 506 (D.C. D.C. 1984) ("The broad construction given RICO in criminal prosecutions is simply inconsistent with the narrower construction which must be applied in the context of a civil case").

The Supreme Court - and the nation, including the business community - has, however, come to see the Sherman Act as "the Magna Carta of free enterprise" as "important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972). RICO and the antitrust statutes are well-integrated. Former Assistant Attorney General for Antitrust, Donald Turner, observed, "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." C. Kaysen and D. Turner, Antitrust Policy 17 (1954). RICO focuses on the first two; antitrust focuses on the third. Society needs them both, if its markets are to be not only free, but honest.

Fifty years ago, following the brilliant expose of Ferdinand Pecora, Congress passed the securities acts to deal with abuses, frauds, and deceits in certain limited areas of the marketplace. The acts, however, encountered both open and undercover resistence from brokers and investment bankers. The 1933 Act was, for example, thought to be so "draconian" that it would "dry up the nation's underwriting business and that 'grass would grow in Wall Street.'" D. Rather, Securities Regulation 80 (1982). Early decisions by the pre-New Deal Supreme Court also reflected a similar hostility. See, e.g., Jones v. Securities Comm'n., 298 U.S. 1 (1935) (subpoena to testify properly quashed). Justices Cardozo, Brandeis and Stone in dissent in Jones protested the Court's narrow reading of the 1933 Act, for they knew that the criminal law alone, as Justice Jackson was later to observe, "had long proved futile to reach the subtler kinds of fraud at all, and able to reach grosser fraud, only rarely." Jackson, The Struggle for Judicial Supremacy, 152 (Vintage 1941). Today, ironically, those acts are what the securities industry relies upon in attacking RICO and defending the legal status quo. In fact, as with the antitrust statutes, both are needed.

Civil RICO builds upon the experience of the last half century in the antitrust and securities areas and generalizes it across the marketplace. As the antitrust acts seek to maintain economic freedom in the marketplace, RICO seeks, in the fraud area, to promote integrity in the marketplace. RICO is, therefore, neither anti-business nor pro-business. It is pro-victim.

Legitimate business people, like lawyers, doctors, prison officials, and police officers, cannot expect to be freed from their legal duty to respond to well-plead complaints. As Justice Brandeis observed, "Lawsuits . . . often prove to . . . [be] groundless; but no way has been discovered for relieving a defendant from the necessity of a trial to establish the fact." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52 (1938). Justice Marshall in Sedima (53 U.S.L.W. at 5040), however, suggests that private litigation, unlike public litigation, is "unrestrained." We disagree. Under the Model Code of Professional Responsibility, an attorney may be subject to discipline for filing a suit on behalf of his client for the purpose of harassing or maliciously injuring another. (DR7-102(A)(1)). Similarly, he may not knowingly advance a claim or defense unwarranted by existing law, unless he can make a good faith argument for its extension, modification, or reversal. (DR7-102(A)(3)). Defendants subjected to meritless civil claims, moreover, are not without recourse. Tort remedies include abuse of process, which is applicable where suits are filed to force nuisance settlements. See, e.g., Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980) (suit by doctor charging malpractice litigation brought by attorney improper). If these traditional ethical injunctions and tort remedies are not adequate, it is these remedies and not substantive rights that should be reformed. Recently, Justice Stevens aptly commented: "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfound claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law . . ." Hoover v. Ronwin, 104 S. Ct. 1989, 2012 (1984).

Those who express a concern with frivolous suits under civil RICO have the burden of proving that a substantial number have been filed, that existing safeguards against such suits are not adequate to remedy them, that new safeguards against such suits that are adequate cannot be designed, and that the detriment from these suits outweighs the benefit from legitimate suits. None of these burdens has been met. In fact, a study of the United States Judicial Conference in 1983 concluded that "the existing tools [were] sufficient [although] not fully understood or utilized." Administrative Office of the United States Courts, 1983 Annual Report of the Director: Report of the Judicial Conference of the United States, 56 (1983). See generally Reiter v. Sonotone Corp., 442 U.S. 330, 344-45 (1979) (fear of frivolous suits unjustified in light of tools available). For application in RICO cases, see WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate System, 103 F.R.D. 417, 420-21 (N.D. Cal. 1984) (sanctions under Fed. R. Civ. P. 11 imposed for frivolous RICO claim based on picketing); Gordon v. Heimann, 715 F.2d 531, 539 (11th Cir. 1983) (bad faith counsel fee award in civil RICO appeal); King v. Lasher, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (bad faith counsel fee award in civil RICO suit). Frivolous defenses to valid RICO and other claims may also be made the subject of sanctions. Miller v. Affiliated Financial Corp., 600 F. Supp. 987, 990-92 (N.D. Ill. 1984).

Justice Marshall in Sedima (53 U.S.L.W. at 5041) also suggests that "a prudent defendant, facing ruinous exposure [under RICO] will decide to settle even a case with no merit." Accordingly, civil RICO lends itself, he argued, to the very extortive purpose "it was designed to combat." Justice Marshall cites as authority for this extraordinary proposition the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporations, Banking and Business Law 69 (1985). The Ad Hoc Task Force, in turn, conducted a survey of 3,200 corporate and litigation lawyers, of whom only 350 responded. Two factors, however, undermine the scientific credibility of the general results of the survey: (1) the population questioned was unrepresentative of the bar, and (2) the response rate was insufficient to warrant broad generalizations. More to the point here, the survey did not ask each of the respondents a carefully phrased question calling for their opinion or experience with RICO as a settlement weapon. Instead, the opinion relied upon by Justice Marshall was volunteered by only two of the 350 respondents as grounds for repealing RICO. In fact, it is the experience of a majority of seasoned litigators in the RICO area that adding a RICO claim to a suit does not facilitate settlement; it inhibits it, particularly when a legitimate business is involved. See A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, ABA Criminal Justice Section 121-23 (1985). Generally, such businesses wrongfully accused of "racketeering" will not settle suits - even those that should be compromised - as long as the racketeer label is in the litigation. Indeed, it is difficult to understand how Justice Marshall could believe that a suit with "no merit" faces a defendant with "ruinous exposure." If the plaintiff's suit has no merit, his chance of success is zero, and zero multiplied by three (or any other number) is still zero. Before this Committee accepts Justice Marshall's claim from any witness who appears before it, it ought to ask for the names of the defendants and the cases allegedly so settled. It should then inquire of the plaintiffs what their evidence was. It is doubtful that you will find that the litigation was meritless. It is doubtful, in short, that responsible corporate or other defendants are paying off strike suits in the RICO - or any other area - at more than their settlement value, no matter what the theory of the complaint is. Neither the racketeer label nor the threat of treble damages will convince prudent managers lightly to surrender scarce resources merely because another files a suit. No matter how colorfully it is phrased, the claim that such managers act against their own interests is not credible.

If unethical attorneys have brought some frivolous suits under RICO falsely alleging fraud, they should be disciplined and, if necessary, additional remedies should be designed to deal with frivolous litigation. Suggested language to achieve that objective is attached to this statement as Exhibit "E". We should not, however, compound our injury from such frivolous litigation by denying victims of racketeering rooted in fraud their day in court under RICO. Fraud is a national problem in our society that requires stronger, not weaker, legislative efforts to curtail it.

Nor can it be persuasively argued that private RICO suits threaten unjustifiably to flood the federal courts. RICO was not discovered by the private bar until about 1979. Studies by the Department of Justice indicate, however, that less than 500 civil RICO suits have been brought to date and that 65% of them have had an independent basis for federal jurisdiction. The litigation, accordingly, is neither wholly new nor of flood proportions. Even if civil RICO suits were to increase to a figure of 500 annually, and that figure were then multiplied by 10, an unlikely prospect, they would constitute less than 2% of all federal filings (5,000 out of 250,000). Indeed, it is most likely that they will eventually fall somewhere between the present antitrust (1200 civil; 75 criminal) and securities and commodities (3000 civil; 26 criminal) litigation. This would place RICO cases well below the major areas of current federal litigation: overpayments and enforcement of judgments (41,000), prisoner petitions (26,000), social security (20,000), civil rights (20,000), and labor (11,000).

A point must be made, too, about the fact of litigation. Litigation itself, as the Supreme Court recognized in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265, 2278 (1985), is not "an evil." "Over the course of centuries," the Court noted, "our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail." Id. "That our citizens have access to their civil court," the Court concluded, "is not an evil to be regretted; rather, it is an attribute of a system of justice in which we ought to take pride." We agree. Accordingly, it ought to be recognized that the mere fact of RICO suits is not a matter to be decried or deplored.

The concept in RICO of a private enforcement mechanism reflects ideas found in the antitrust laws. Similarly, the RICO civil suit in the area of commercial fraud promises to serve as a like guarantee of the integrity of the market place. See, e.g., Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 (5th Cir. 1984) (scheme to defraud governmental unit) ("Congress [intended] . . . the provision for treble damages . . . to encourage private enforcement of the laws on which RICO is predicated.")

The idea of treble damages for certain kinds of unlawful commercial practices has deep roots. It had its origins in the Statute Against Monopolies, [1624] 21 James I, c. 3, Section 4 of which authorized treble damages for those injured by unlawful monopolies. Rightly, Parliament recognized that it was "one thing to pass statutes and . . . quite another then to insure that [they were] actually enforced." IV W. Holdsworth, A History of English Law at 355 (3rd ed. 1945). Accordingly, "it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in seeing that a statute was enforced . . . ." Id. Going back to Roman Law, we see the idea of multiple damages for various kinds of wrongs as a characteristic feature. The "delict" of theft ran back at least to the Twelve Tables (450 B.C.). "[T]he penalty . . . [was] four times the value of the thing stolen" when the offender was caught in the act; otherwise, it was "double." A. Watson, The Law of the Ancient Romans at 76 (1970). Extortion was remedied by four times the loss. Id. at 80. Possession of stolen property was remedied by three times the value of the property. Id. at 77.

Much of what the Supreme Court has said about the antitrust laws may be said of the RICO private civil suit concept. RICO creates "a private enforcement mechanism that . . . deter[s] violators . . . and . . . provide[s] ample compensation to . . . victims." Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982). Such "private . . . litigation is one of the surest weapons for effective enforcement." Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965) A private "treble-damage remedy [is needed] . . . precisely for the purpose of encouraging private challenges to violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344

(1979) (emphasis in original) Such suits "provide a significant supplement to the limited sources available to the" government. Id.

Professor Edelhertz rightly observed:

> In an earlier age the unlawful or ethically questionable amassing of wealth was characteristically accomplished by bald plunder or seizure of the public domain. "Teapot Dome" was a classic case, as was the land-grant device which provided the capital for building much of this Nation's railroad grid. Today such blatant power and property grabs are avoided. . . . More of us are now beneficiaries of trusts and quasi-trusts managed by the growing fiduciary industry. New targets for crime are the increasing proportion of trusts and estates of middleclass decedents, interests in union and company pension, welfare, and profit-sharing funds, and the broad panoply of mutual funds, investment trusts, credit unions, and investment clubs . . . . As individuals we are more exposed to abuse. We are more likely to deal with strangers than with those we know (whose blemishes we can assess), and we are more vulnerable than we used to be because we tend to rely more on one another or on protection by Government. Those who buy securities are better protected than ever before because of the work of the Securities and Exchange Commission and comparable state agencies, yet are more exposed to the stock fraud artist who deceives the regulatory agent or totally circumvents its supervision . . . . Caveat emptor loses meaning when we buy closed packages . . . . White collar crime is a low visibility, high impact factor in our society. Because of the changes in the nature of our economic organizations, particularly new developments in marketing, distribution, and investment, it is a fair assumption that white-collar crime has increased at a rate which exceeds population growth. Its effects intersect with and interact with other problems of our society, such as poverty and discrimination. It also weighs heavily on the aged who are, in our society, divorced from the homes and community of their children in contrast to most prior human social organization . . . . White-collar crime, like common crime, can have a serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions. Every stock market fraud lessens confidence in the securities market. Every commercial bribe or kickback debases the level of business competition, often forcing other suppliers to join in the practice if they are to survive . . . . The pharmaceutical company which markets a new drug based on fraudulent test results undercuts its competitors who still marketing the properly tested drugs, and may cause them to adopt similar methods. Competitors who join in a conspiracy to freeze out their competition, or to fix prices, may gravely influence the course of our economy, in addition to harming their competitors and customers.
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> H. Edelhertz, The Nature, Impact, and Prosecution of White Collar Crime at 6-9 (1970).

III

The Chairman of the Committee asked whether or not RICO ought to be limited to organized crime. We believe it should not be so limited.

First, no generally accepted definition of "organized crime" - or for that matter, "white-collar crime" or "garden variety fraud" - exists. But if it did, it ought not be employed to limit the ability of victims of racketeering activity to seek relief under RICO. Victims of crime rightly care little that their life savings were taken by mobsters wearing black suits and white ties or crooked accountants wearing Brooks Brothers suits and white collars. Ask the victims in Ohio of the fraudulent audit report that led to the demise of E.M.S. Government Securities, Inc. and Ohio's savings and loan industry whether they were more harmed last year by fraud or drugs coming out of Florida, an enforcement priority of the federal government. You know what the answer would be. Ask, too, the victims of the collapse of the savings and loan industry in Maryland. Our deepest legal traditions run against writing different laws for different people. When Virginia became a Commonwealth and in 1777 established its Court of Chancery, the oath for the chancellor - written by George Wythe - America's first law professor and the teacher of Thomas Jefferson - read:

> You do swear to do equal right to all manner of people, great and small, high and low, rich or poor, according to equity and good conscience and the laws and usages of Virginia, without respect of persons. x x x You shall . . . do equal and impartial justice without fraud, favor, affection or partiality. So help you God.
>
> Quoted in J. Noonan Bribes 428 (1984).

This Committee and this Congress ought not break faith with that tradition and undertake to write special legislation for special interests.

Second, the problem of proof, no matter how the phrase is defined, would be virtually insurmountable for the private civil plaintiff. If such a showing were required in a criminal case, even the government, with its extraordinary evidence gathering techniques, would have a difficult time showing "organized crime."

Third, proof of such a requirement, if it were limited to the private civil side, would create an anomalous result. The complaining witness in a criminal RICO prosecution would find himself saddled with an extra element not required of the government, one which he probably could not prove. He would be, therefore, a "RICO victim" in the criminal case, but would not be entitled to a RICO remedy in the civil suit. His recovery would be stymied by the additional element. No law ought to foster such results.

Fourth, the requirement would be unprecedented in federal law. Congress has enacted a number of specific statutes since the 1930's designed to deal with aspects of the organized crime problem. Yet it has never limited those statutes in application to "organized crime" figures or "organized crime" groups. Those statutes have dealt with sports bribery, explosives, loansharking, obstruction of criminal investigations, extortion racketeering, lottery tickets, gambling, and bank robbery. Once the Congress has decided to draft a law, it has decided to apply one standard to all individuals and groups. Special legislation for select individuals or groups is alien to our legal tradition. Congress has always avoided it. We share that tradition. Attached to this statement as Exhibit "F" is a list of those statutes and the court decisions under them that have uniformly rejected an "organized crime" limitation. The list notes, not including Sedima, no less than six Supreme Court decisions. The Committee is respectfully referred to those opinions in particular for the reasons of the Supreme Court in refusing to limit the statutes to "organized crime" or any similar designation, despite the motivation that might have led to their adoption. The Supreme Court in Sedima (53 U.S.L.W. at 5038) held that RICO applies to "'any person' - not just mobsters." We see no reason to depart from that ruling.

Attached to this statement as Exhibit "G" is the statement of Senator McClellan when he opposed a similar effort to limit Title III, which deals with wiretapping, of the 1968 Crime Control Act; the effort failed by a vote of 60 to 20. 114 Cong. Rec. 14705 (1968).

Attached to this statement as Exhibit "H" is the statement of Congressman Poff when he commented on the similar concerns raised during the processing of the 1970 Act.

The 1970 Act was composed of thirteen titles, eleven of which contained substantive provisions:

1. Title I (grand jury),
2. Title II (immunity: applicable to all court administrative and congressional proceedings),
3. Title III (recalcitrant witnesses),
4. Title IV (false declarations),
5. Title V (witness protection),
6. Title VI (depositions),
7. Title VII (sources of evidence),
8. Title VIII (syndicated gambling),
9. Title IX (RICO),
10. Title X (dangerous special offender sentencing), and
11. Title XI (explosives).

Each of these Titles were examples of general reform, enacted in light of organized crime, but not limited in their application to the occasion that principally motivated their enactment. Only Title V and Title VI were limited in 1970 to "organized criminal activity." 84 Stat. 933 (1970); 84 Stat. 934 (1970) (current version at 18 U.S.C. § 3503 (1982)). Even that phrase has been appropriately read broadly to include "white collar crime." United States v. Carter, 493 F.2d 704, 708 (2d Cir. 1974) (construction of § 3503). Moreover, in 1975, Congress removed, in effect, that limitation from the depositions provisions. Fed. R. Crim. P. Amendments Act of 1975, Pub. L. No. 94-64, 89 Stat. 373, 374 (codified as amended at 18 U.S.C. § 3503 (1982)). It removed the limitation from the witness protection provisions in 1984. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2153 (codified as amended at 18 U.S.C. § 3521 (1985)).

Justices Powell and Marshall in dissent in Sedima seemingly have forgotten those holdings under the Organized Crime Control Act of the Court that fully reflect these points and that they themselves authored. In Iannelli v. United States, 420 U.S. 770, 789 (1975), writing for the Court, Justice Powell termed the 1970 Act "a carefully crafted piece of legislation." He then read the gambling provisions of the Act contained in Title VIII in light of the "structure" of the other Titles of the Act, including Title IX (RICO) and Title X (Dangerous Special Sentencing). 420 U.S. at 786-91. That Title IX represented general reform, not limited to "organized crime," can be seen by analogy most clearly in Justice Powell's opinion in Kastigar v. United States, 406 U.S. 441 (1972). In Kastigar, the Court upheld the constitutionality of Title II of the Act, which deals with immunity, not merely in "organized crime" investigations and prosecutions before grand juries or courts, but also in any proceeding before a legislative body, administrative agency, or a court or grand jury. Justice Powell, writing for the Court, specifically noted that Title II was general reform, even though it was enacted as part of the Organized Crime Control Act. 441 U.S. at 452 n. 36. Justice Marshall, too, apparently overlooked in his analysis of RICO in Sedima his own opinion for the Court in United States v. Culbert, 435 U.S. 371 (1978). In Culbert, the Court held that the extortion provisions of 18 U.S.C. § 1951 (1982), which had their origins in the Anti-Racketeering Act of 1934, did not require a special showing of "racketeering." Justice Marshall noted that "read[ing] a racketeering requirement into the statute . . . might create serious constitutional problems in view of the absence of any definition of racketeering . . . ." 435 U.S. at 374. Indeed, he noted that the "term and the associated word 'racket' had 'for some time been sued loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent or even disliked, whether criminal or not (citations omitted).'" Similarly, when he wrote the Court's opinion in Dunn v. United States, 442 U.S. 100 (1979), which construed the false declaration provisions of 18 U.S.C. § 1623 (1982), enacted in Title IV of the Act, he recognized that the various Titles of the Act, including Title II (Immunity) and Title IX (RICO) should be read together, but he did not suggest that they did constitute other than general reform whose language extended beyond "organized crime." 442 U.S. at 107-13.

Accordingly, we believe it would be unwise and unjustifiable to add an "organized crime" requirement now to RICO.

IV

The Chairman of the Committee asked whether or not RICO ought to contain equitable as well as legal relief for private plaintiffs. We believe that equitable relief for private plaintiffs is already authorized under 18 U.S.C. § 1964 (1982). We agree with the analysis set out in Professor Johnson's able piece, Predators Rights: Multiple Remedies for Wall Street Sharks and the Securities Laws and RICO, 10 Journal of Corp. Law 3 (1984). See also, Note, The Availability of Equitable Relief in Civil Cause of Action in RICO, 59 Notre Dame L. Rev. 945 (1984). We recognize, of course, that a sharp split exists in the courts on this question. Whatever the legal validity of these contrasting views, this Committee should consider the issue on the merits and clarify the matter.

We note, too, that bills were introduced by Senators McClellan and Hruska in the 92nd and 93rd Congress in clarifying the question of the availability of equitable relief for private parties and reaffirming the commitment to the treble damage concept in RICO. S. 16 was, in relevant part, identical to S. 13. Both bills were reported out by this Committee and passed, without objection, by the Senate, but they were not acted upon in the House. They had the support of the Department of Justice and the American Bar Association. Hearings Before the Subcommittee on Crim. Laws and Procedures of the Senate Comm. on the Judiciary, Victims of Crime, 92d Cong., 1st Sess. 159, 490 (1972).

We believe that the equitable remedies provided in Section 1964(a) are essential to the realization of RICO's remedial goals. Those goals include the elimination of substantial profits and economic power bases obtained through corrupt practices. In light of these goals, equitable remedies are equally effective whether civil RICO actions are initiated by the United States or by private parties.

Section 1964(a) confers on district courts specific and expanded equitable powers, for example, divestiture of interests and dissolution of infected entities - that are tailor-made to achieve RICO's purposes. Section 1964(a) itself addresses the powers of the district court, and by its terms, does not limit the exercise of those powers to actions brought by the United States. The failure to impose any such restriction is logical. While treble damages serve the dual purpose of redressing victims' injuries and sanctioning defendants, Section 1964(a) is directed at dismantling illicit and corrupted enterprises, forcing defendants to disgorge ill-gotten gains, and preventing defendants from using their unlawfully acquired economic power as leverage in the marketplace. No logical or principled reason exists to permit such equitable relief in United States-initiated civil RICO actions, but not in private-party suits. We can think of no reason why Congress in 1970 - or now - would have circumscribed the federal courts' exercise of equitable powers.

It may also be appropriate to consider the consequences of a failure to recognize that RICO's remedial purposes are enhanced by including within its text all forms of relief. These consequences can only be described as perverse. Congress did not enact such legislation in 1970; it ought not enact it now. The law would be uncertain, inadequate, and inconsistent, and it would produce forum shopping. None of these results can be justified.

Not including equity relief in RICO will not mean that it will be unavailable in RICO litigation; it will only mean that its availability would rest solely on the traditional ancillary powers of the federal district courts under the All Writs Act, 28 U.S.C. § 1651(a) (1962); F.T.C. v. Dean Foods Co., 384 U.S. 597, 603-05 (1966) (preliminary injunction issued to prevent merger); ITT Community Dev. Corp. v. Barton, 457 F.Supp. 224 (M.D. Fla. 1978) (preliminary injunction issued to protect damage claim), or it would become a matter dependent on varying state law under the doctrine of pendent jurisdiction or diversity jurisdiction. Since the exercise of pendent jurisdiction, however, is a matter of discretion, not right, litigators, without diversity jurisdiction, would not be able to know in advance whether a particular court would choose to exercise it. Uncertainty would result.

Assuming that a district court, however, chose to exercise pendent jurisdiction, or that a basis for diversity jurisdiction was present, the court's equity powers would then be exercised under that body of federal and state law that Congress has already found to be inadequate in the Organized Crime Control Act, 84 Stat. 923 (1970) ("sanctions and remedies . . . unnecessarily limited in scope and impact."). Indeed, the movement to adopt RICO legislation at the state level that has made such impressive gains since 1970 may be described as a confirmation by the states of that 1970 congressional finding. See generally Hammond, Interlocutory Injunctions: Time for a New Model, 30 U. of Tor. L. Rev. 240 (1980) for a powerful critique of the traditional equity approach from a historical comparative, and functional perspective that argues that present limits on equity jurisdiction were slavishly adopted in the 19th century in the United States from English jurisprudence, where they were rooted in a jurisdictional relation between law and equity courts anachronistic in light of their merger and modern crowded court dockets.

On the other hand, if RICO itself contains all forms of relief, as we believe it now does, it would not be necessary for either the government or a private party to show irreparable injury or the inadequacy of a remedy at law. See, e.g., Atchison Topeka and Santa Fe Ry v. Lennen, 640 F.2d 255, 259-60 (10th Cir. 1981). Otherwise, the traditional equitable criteria would have to be applied under the All Writs Act, 28 U.S.C. § 1651(a) (1982), Rule 65 Federal Rules of Civil Procedure, or state law. See, e.g., USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 99 (6th Cir. 1982).

The result obtained by a prejudgment attachment under Rule 64 of the Federal Rules of Civil Procedure is no more attractive. Rule 64 explicitly excludes federal statutes like RICO. Where no federal statute is applicable, the matter is governed by state law. The availability of such relief varies widely from state to state, usually depending "upon each states attitude toward the debtor - creditor relationship." 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 64.04[3] at 64-13 (2d ed. 1948).

More than a little irony, too, accompanies these results. RICO's core concern is, of course, with organized crime activities, even though it constitutes general reform that applies across the board. The government's experience with efforts to forfeit assets in organized crime type prosecutions is, therefore, illuminating. Even with the preverdict seizure orders of 18 U.S.C. § 1963(b) (1982) or 21 U.S.C. § 848(d) (1982), its success in seizing assets for forfeiture has been limited. See, e.g., Hearings before the Senate Subcomm. on Criminal Justice, Comm'n on the Judiciary, Forfeiture of Narcotics Proceeds, 96th Cong., 2d Sess. 96-97, 114 (1980) (testimony of deputy assistant attorney general) (three problems: (1) ascertaining what the assets are, (2) reaching them if they are in the hands of third parties, and (3) preventing their dissipation before trial; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"). That is why Congress acted to strengthen the 1970 acts in the crime control measure last year.

Note, too, the specter of inconsistent results from case to case is present. RICO includes a requirement of a pattern of racketeering activity - multiple violations of other federal or state statutes. Accordingly, the conduct that violates RICO may well extend across state lines. RICO is, therefore, that "unusual case", in which a claim may be thought to arise in more than one district in more than one state. See Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1979). Under RICO's nation-wide service of process and venue provisions, ample room will exist, therefore, for forum shopping between various states by the skillful litigator to avoid the unfavorable law of a particular state.

Accordingly, it is doubtful that a private party, who may be forced to wait until a verdict to secure his ability to execute his money damage award, will too often collect anything, or, for that matter, even bother to sue in the organized crime area. Only skillful forum shopping, not the merits of his claim, will offer him much hope of success. That means, too, that RICO, as a practical matter, will generally offer realistic damage relief only against the white collar offenders, who have assets in the community available for execution. Those who are concerned with the breadth of RICO, that is, its application beyond organized crime, ought also to be concerned that not including equity relief might mean that, practically speaking, it would only apply to white collar offenders. That result can only be described as perverse. Congress did not intend it in 1970. It ought, if necessary, to clarify the question now and guarantee that full equity relief is available to private parties.

V

The Chairman of the Committee asked whether or not private claims for relief ought to be limited by a criminal conviction requirement. That issue was, of course, resolved against the requirement by the Supreme Court under RICO in Sedima. The Committee should consider the issue, however, on its merits and, we believe, take whatever action is appropriate so that a prior criminal conviction under criminal RICO or its predicate offenses is not a requirement for bringing a civil RICO claim.

RICO was, of course, modeled by its sponsors on the antitrust laws, which do not require proof of a criminal conviction to bring a civil action. Standard Sanitary Mfg. v. United States, 226 U.S. 20, 52 (1912) (a conviction would "take from the statute a great deal of its power.") A prior criminal conviction requirement would unduly restrict access to the courts by those private attorneys general and would in effect discard the "private attorney general" function. We see no valid reason for applying a different rule under RICO.

Such a change, some critics urge, is needed to prevent frivolous RICO suits and to keep manageable the workload of the federal judiciary. Those two concerns have already been discussed. Neither is valid. Other substantial policy reasons exist which make the prior criminal conviction limitation unwise.

First, the requirement of a prior criminal conviction would drastically restrict the private plaintiff's access to the courts. Requiring a prior criminal conviction reduces the RICO civil statute to a trivial remedy. This result is illustrated by considering the number of civil and criminal actions filed in federal court in the areas of antitrust and securities. As noted above, in the antitrust area, 1200 civil actions are filed each year, while only 74 criminal cases are brought. Under securities and related laws, 3000 civil actions are filed each year, while only 26 criminal actions are brought. Requiring a prior criminal conviction in either of these areas would castrate the civil remedies available under these statutes. A similar result would obtain under RICO. Indeed, that is the not-too-well-hidden purpose of those who recommend the criminal conviction limitation. It would turn RICO's promise of remedial relief for victims of crime into a sham. Congress ought not be a party to that kind of legislative fraud.

Second, if this change were adopted, matters wholly unrelated to the merits of the plaintiff's RICO claim would determine who could recover, or even who could file a suit. When a prosecutor, for example, decides not to bring a RICO case, he would, therefore, completely foreclose any possibility for any RICO victim to have his day in court under RICO. A federal prosecutor might, for example, decide to grant a defendant immunity, or permit the defendant to plead to another offense, or agree to turn states evidence. In that case, a civil plaintiff, either an individual or a state or local unit of government, would be totally barred from recovery under RICO. Even more troubling would be a denial of access to the court where no conviction was obtained because of a procedural flaw at the grand jury stage or at the criminal trial not related to guilt or innocence.

Third, a prior RICO conviction requirement would also prejudice the criminal justice system as a whole. By requiring a conviction on the RICO count, a defendant's incentive to plea bargain to a non-RICO offense would be dramatically raised. By avoiding a RICO conviction, the defendant would shield himself against all civil claims, leaving the victim without RICO recourse. In addition, the victim as a potential civil plaintiff would be an interested witness at the criminal trial. His testimony would be subject to credibility attacks because he would have acquired an interest in the outcome.

Fourth, beyond its impact on a defendant's incentive to plea bargain and the credibility of witnesses, requiring a prior criminal conviction would place unwarranted political pressure on prosecutors, since the opportunity for a RICO victim to recover would depend on the institution and success of the government's case.

The Supreme Court recognized the validity of these policy concerns in its Sedima decision (53 U.S.L.W. at 5037). No major civil cause of action in Anglo-America jurisprudence is, in fact, now circumscribed by a prior criminal conviction. See generally Note, Civil RICO: Prior Criminal Conviction and Burden of Proof, 60 Notre Dame L. Rev. 566 (1985). We can think of no valid reason to reject the Supreme Court's analysis and to make civil RICO the first claim for relief in modern American jurisprudence so limited.

VI

The Chairman of the Committee asked whether or not RICO ought to be limited by imposing a burden of proof higher than preponderance of the evidence. A call has been made, in the absence of requiring a prior RICO criminal conviction as a prerequisite to bringing a civil suit, to change the burden of proof by which the civil RICO plaintiff must establish his case. Some suggestions would raise the burden of the plaintiff's proof from a preponderance of the evidence, the civil standard, to "beyond a reasonable doubt," the criminal standard. Others advise a change in the proof of the predicate offenses to the criminal standard, while leaving the remainder of the plaintiff's case to be proved by a preponderance.

As noted before, RICO was modeled on antitrust statutes, which only require proof by a preponderance of the evidence. Ramsey v. UMW, 401 U.S. 302, 307-11 (1971). We see no valid reason for imposing a higher burden on RICO. A majority of the state statutes that explicitly deal with the issue set the standard at a preponderance.

Civil RICO is explicitly remedial, not penal. As such, the preponderance standard should apply. See generally Note, Civil RICO: Prior Criminal Conviction and Burden of Proof, 60 Notre Dame L. Rev. 566 (1985). When the purpose of a statute is penal and life and liberty interests are at stake, then the proof required for the government to prevail must be beyond a reasonable doubt. When the interests in issue are primarily pecuniary, then the higher standard is not demanded, and the risk of error should be shared by the parties.

One challenge often made to the present burden of proof is based on the possibly stigmatizing effect of a RICO verdict. By changing the burden of proof, RICO critics hope to shift the "risk of opprobrium." This concern, however, is not enough to warrant the heightened standard. In analogous civil actions, which impute equally "stigmatic" labels as that of "racketeer," the standard remains a preponderance of the evidence. See, e.g., Watson v. Adams, 187 Ala. 490, 494, 65 So. 528, 533 (1914) (wrongful death) ("Great as the love of money may be in some human beings, it cannot be presumed that to be held liable for damage is, to the ordinary man, the equivalent of the impending, unless divested, exaction of his freedom or his life . . .") The burden of proof for a civil plaintiff to prevail on a RICO claim should remain "a preponderance of the evidence."

The Supreme Court in Sedima (53 U.S.L.W. at 5037) observed: "As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings." Other federal statutes, which also impute criminal activity, for example, the fraud provisions of the securities acts, similarly require only a preponderance of the evidence as the burden of proof. Herman & MacLean v. Huddleston, 103 S. Ct. 683, 691 (1983). A major factor in enactment of the federal securities statutes was, in fact, a desire by Congress to correct deficiencies in the common law protections against fraud developed in the 19th Century. The Supreme Court in Herman & MacLean considered the applicable standard of proof in a private action under the Securities Exchange Act of 1934. Mindful that common law fraud under 19th century jurisprudence, with its emphasis on a philosophy of laissez faire, required a "clear and convincing" standard, the Court, nevertheless, labeled reference to common law practices, "misleading . . . since the historical considerations underlying the imposition of a higher standard of proof (has) questionable pertinence here." Id. The Court found the preponderance of the evidence standard applicable in a Section 10(b)(5) case. This standard, the Court found, "allows both parties to 'share the risk of error in roughly equal fashion.' (cite omitted) Any other standard expresses a preference for one side's interests." 103 S. Ct. at 692. Despite the "risk of opprobrium that may result from a finding of fraudulent conduct," which a defendant faced, the Court chose not to express a preference for either side. Nor should this Committee. Between an alleged "RICO perpetrator" and an alleged "RICO victim" how can Congress put its thumb on the scales of justice in favor of the perpetrator?

While recovery under RICO is premised on a showing of unlawful activity, its purpose is not penal - the sole purpose of Section 1964 is to afford a civil remedy to victims, including adequate compensation. United States v. Bornstein, 423 U.S. 303, 313-17 (1976). See generally Georing, The Characterization of Treble Damages: Conflict Between a Hybrid Mode of Recovery and a Jurisprudence of Labels, 1 Materials on RICO 428 (Cornell Institute on Organized Crime 1980) Death, punishment, or incarceration is not at stake, only the loss of money or power. Pecuniary interests, even involving a possible stigma, do not warrant the higher standard.

Traditionally, the government bears the risk of loss in securing a conviction for a crime. The individual's life and liberty interests demand that the risk not be shared equally. Accordingly, the law developed the presumption of innocence and the heightened standard of beyond a reasonble doubt.

Something less than the "beyond a reasonable doubt" standard, but more than the civil standard has, of course, been required where "particularly important individual interests or rights are at stake." Herman & MacLean, 103 S. Ct. at 691. This intermediate standard, applicable in a limited line of cases, like termination of parental rights, deportation, and involuntary commitment proceedings, is required because there is more than a pecuniary interest at stake. The "clear and convincing" standard is required where interests border on the vitality of life and liberty interests.

The pecuniary interests of RICO defendants, however, even coupled with a concern over a stigma of criminality, do not border on this vitality. For those parties fitting the definition of "racketeer," the legal label can be no more stigmatizing than that of "killer" for the defendant liable in a wrongful death suit. Other actions impute as equally "stigmatic" labels as "racketeer": the insurance claimant denied proceeds due to a defense of "arson" is an "arsonist"; the plaintiff denied recovery because of the defense of a gambling debt is a "gambler"; the defense of "bribery" to an action for breach of contract makes the plaintiff a "briber"; or the defense of truth to a defamation case alleging commission of a crime make the plaintiff a "criminal." In these actions the preponderance standard remains the proper burden of proof. See, e.g., Taglianetti v. New England Tel. & Tel. Co., 81 R.I. 351, 354, 103 A.2d 67, 70 (1954) (disconnect phone of "gambler" on showing of preponderence.) To increase the plaintiff's burden of proof in a civil RICO case would express a preference for the defendant's side.

Congress, in good conscience, ought not take that step.

VII

The Chairman of the Committee asked whether or not the list of predicate offenses in RICO might not be made more definite.

RICO's list of predicate offenses appears in 18 U.S.C. § 1961(1) (1982). Subsection (A) incorporates a series of state offenses generally. Subsections (B) and (C) incorporate a series of federal offenses by specific citation. Subsection (D) incorporates generally bankruptcy fraud (Title 11), securities fraud, and certain drug offenses. Lastly, Subsection (E) incorporates any act indictable under the Currency and Foreign Transactions Reporting Act.

The language of Subsection (D) has given rise to two concerns. It has been argued, unsuccessfully, that "marijuana" is not among the included drug offenses. See, e.g., United States v. Bascaro, 742 F.2d 1335, 1342-43 (11th Cir. 1984). It might be useful, nonetheless, to make the reference to the drug offenses more specific, as was done in 18 U.S.C. § 1952(b) (1982), when the Controlled Substances Act was passed in 1970, Pub. L. No. 91-513, 84 Stat. 1282 (1970) (codified at 18 U.S.C. § 1952(b) (1982)). Suggested language to achieve that objective is attached to this statement as Exhibit "E".

Apparently, an impression is also widespread among the securities industry that RICO simply "overlaps" all securities fraud. Justice Marshall in dissent in Sedima expressed a similar concern (53 U.S.L.W. at 5041) ("virtually eliminates decades of legislative and judicial developments of private civil remedies under the federal securities laws"). Nothing could be further from the truth. RICO says "offenses" involving "fraud in the sale of securities" "punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1982). "Offense" means criminal offense.

Black's Law Dictionary at 975 (5th ed. 1979). See Trane v. O'Connor Securities, 718 F.2d 26, 29 (2d Cir. 1983) ("obviously refers to criminal punishment"); Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983) ("criminal intent is . . . necessary in either mail fraud or securities fraud [under RICO.]"). Accordingly, only the criminal fraud provisions of the securities acts fall within RICO. See, e.g., Securities Act of 1933, 15 U.S.C. § 77x (1982) ("willfully"); Securities Exchange Act of 1934, 15 U.S.C. § 78ff (1982) ("willfully"). Merely negligent conduct or a transaction that only operates as a fraud does not fall within the statute. See Aaron v. Securities and Exchange Comm., 446 U.S. 681, 701-02 (1980) (intent to defraud rather than negligence in § 10(b) ('34) or § 17a(1) ('33), but not untrue statements or admission or transactions that operate as a fraud § 17(a)(2) or (3) ('33)). Such an overlap between statutes is neither "unusual nor unfortunate." S.E.C. v. National Securities, Inc., 393 U.S. 453, 468 (1969). Indeed, the securities acts themselves envision it. See, e.g., Section 28(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78 § bb(a) (1982) ("rights and remedies" "in addition" to "all other" that might exist). RICO, too, recognizes the overlap. 84 Stat. 947 (1970) ("Nothing in this title shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title"). Nevertheless, it might be useful to make the reference to the securities and related offenses more specific. Suggested language to achieve that objective is attached to this statement as Exhibit "E".

VIII

The Chairman of the Committee asked whether or not RICO was consistent with our fundamental notions of federalism.

We believe that it is. We disagree with the suggestion of Justice Marshall in Sedima (53 U.S.L.W. at 5041) that

RICO improperly alters the fundamental federal-state balance. The principal role in crime control and civil redress must, of course, be left to those units of government closest to the people. The control of sophisticated forms of criminal and unlawful behavior, however, today is no longer a matter that is best left to the exclusive jurisdiction of local units of government. There must be - and increasingly there are - valuable partnerships in crime control in existence between local units of government and statewide agencies as well as between local and state units of government and federal agencies.

The recent indictment of the heads of the five families of organized crime in New York City well illustrates that partnership. The crucial item of evidence, an electronic tape of organized crime conversations that occurred in an automobile, was obtained by The New York State Organized Crime Task Force, a statewide agency, headed by Deputy Attorney General Ronald Goldstock. Because New York does not have a RICO statute, that tape was turned over to the United States Attorney for prosecution federally. Other key evidence was turned over to the federal authorities by the District Attorney in Brooklyn. In fact, that historic prosecution under federal RICO has been made possible by the working partnership between local, state and federal agencies. RICO has, therefore, furthered and made possible local, state and federal cooperation. Accordingly, we would not support any effort to weaken it.

Congress itself in 1970 specifically provided, as noted above, in RICO that nothing in it would "supersede any provision of . . . state or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO. 84 Stat. 947 (1970). The Supreme Court in United States v. Turkette, 452 U.S. 576, 586 n. 9 (1981) aptly observed:

> RICO imposes no restrictions upon the criminal justice systems of the States. (citation omitted) Thus, under RICO, the States, remain free to exercise their police powers to the fullest constitu-

> tional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate acts of racketeering under RICO, is not restriction on the separate administration of criminal justice by the States.

RICO, too, particularly in the fraud area, supports, not undermines, the well-being of the states. Traditionally, a principal justification of federal diversity jurisdiction has rested on the need to guarantee the free flow of capital throughout the United States, a hallmark of our federal system of government. The "flow of capital" analysis is premised on an out of state investor's perception of fairness in the federal courts. That perception promotes economic investment on a nationwide scale. As Chief Justice Taft described it in 1922, "No single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there with jurisdiction to hear diverse citizenship cases." Taft, Possible and Needed Reforms in the Administration of Justice in the Federal Courts, 47 A.B.A. Rep. 250, 258-259 (1922).

Just as diversity jurisdiction promoted the "legitimate development of enterprises" on a national scale, so too, does the existence of the federal civil RICO remedy facilitate needed economic development throughout the United States, which is, of course, in the best interest of the states. The Arizona Supreme court in Arizona ex rel Corbin v. Pickrell, 136 Ariz. 589, 597, 667 P.2d 1304, 1312 (1983), a civil securities fraud action under Arizona's RICO statute, put it well:

> There is a moral imperative to provide redress for those injured. Further, when out-of-state investors are swindled by Arizona enterprises, the reputations and businesses of the majority of honest business people within the state are harmed. That this state is willing to provide aid in redressing these wrongs is evidence that the state is serious in its fight to eradicate organized crime. This evidence may instill confidence in non-residents seeking to invest in the legitimate businesses of this state.

Until such time as all of the states have comprehensive

RICO legislation, federal RICO will play an essential role in the effort to control sophisticated forms of crime and it will provide much needed relief to victims of that kind of crime. Even when state RICO legislation has become a characteristic feature of state jurisprudence, the federal statute will remain an important alternative avenue for redress in those situations where the conduct is multi-state in character. We note, too, that the federal government has played a leadership role in enacting RICO and implementing it. If Congress were to turn its back on that innovative effort, it would give the wrong signal to the states. It might even result in the modification or repeal of state legislation. For the sake of maintaining a healthy federalism, Congress ought, therefore, to strengthen, not weaken, RICO. Accordingly, we see nothing inconsistent with federalism and federal RICO.

IX

Finally, we must take more particular note of two other developments. Recently, conflicting reports on RICO were produced by two special committees of the American Bar Association, one from its Corporations Section and another from its Criminal Justice Section. The Ad Hoc Civil RICO Task Force of the Section on Corporation, Banking, and Business Law produced a critical report suggesting a number of amendments that would strengthen the hands of defendants, particularly corporations, in civil RICO litigation. (The recommendations would do little for the corporation as plaintiff!) Specifically and negatively, the recommendations of the Ad Hoc Task Force would:

1. narrowly redefine "pattern" to limit it to a common scheme,

2. narrowly redefine "enterprise" in the context of associations in fact,

3. limit recovery in civil suits under certain circumstances to distinct injury,

4. narrowly limit the application of the doctrine of respondeat superior in civil suits,

5. raise the burden of proof in civil suit to beyond a reasonable doubt,

6. limit equitable relief in civil suits to preliminary injunctions,

7. repeal the liberal construction directive, and

8. narrow the scope of RICO in the fraud area.

We support none of these recommendations, although we do support a clarification of the concept of pattern, a position taken, by the Task Force and noted by the Supreme Court in Sedima (53 U.S.L.W. at 5038 n. 14, 5039). Nevertheless, as we act to clarify the concept, we must take pains to assure that we preserve that body of jurisprudence under the statute on "pattern" that facilitates the prosecution of conglomerates of crime. See A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee, ABA Criminal Justice Section 36-38 (1985). Decisions such as United States v. Weisman, 624 F.2d 118, 1121-23 (2d Cir.) (not related to each other, but to the enterprise), cert. denied, 449 U.S. 871 (1980) and United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) (simultaneity of murders does not preclude finding continuity) ought to be retained. Their legislative rejection would be retrogressive.

Taken together, the recommendations of the Ad Hoc Task Force recall to mind the comments in 1905 before the Harvard Ethical Society of Justice Brandeis, whose nomination to the Supreme Court in 1916 was opposed by seven past presidents of the Bar Association: "We hear much of the 'corporation lawyer' and far too little of the 'people's lawyer.' The great opportunity of the American Bar is and will be to stand again as it has in the past, ready to protect also the interests of the people." A. Mason, Brandeis and the Modern State 30 (1936). While the Ad Hoc Task Force did sensibly reject the organized crime and the criminal conviction limitations, the credibility of its other recommendations is seriously undermined by three factors: the Task Force was unrepresentative of the Bar Association; it assumed wrongly that the 1970 Act was not general reform, that is, that it was limited in its focus only to organized crime, and third, it declined to examine current conditions that might, whatever the primary purpose of the 1970 Act, warrant its retention or strengthening, particularly in the fraud area.

Fortunately, the Bar Association today reflects a greater diversity of concerns than it did in Brandeis' time. In its report, in sharp contrast, the Committee on RICO of the Section on Criminal Justice - especially broadened in membership to be representative of all segments of the bar - generally supported current law in the context of drafting and commenting on model state RICO legislation.

Neither report, of course, yet represents official ABA policy on civil RICO. That was presented to Congress in 1970 as "unqualified support" for the statute, although the House of Delegates did recommend "fine tuning" of RICO's criminal provisions in August of 1982. Compare Organized Crime Control, Hearings before the House Subcommittee No. 5, House Comm. on the Judiciary, 91st Cong. 2nd Sess. 538, 543-44 (1970) (testimony of president elect of the ABA, Edward L. Wright) with American Bar Association, Report on RICO 2 (1982).

X

As noted above, Mr. Chairman, we invite this Committee to study, not only the experience of the federal government with federal RICO, but also the experience of the states that have made most vigorous use of their state RICO legislation. To assist the Committee in this effort, we attach to this statement a list of state and local actions from Arizona, Florida, New Mexico, and Oregon. See Exhibit "I". When that study is complete, we believe that this Committee will agree with us that federal RICO should be strengthened, not weakened.

XI

We conclude our testimony, as we began it, by expressing our firm support for all efforts to clarify or strengthen RICO and by expressing our firm opposition to any effort to curtail or weaken it, particularly in the fraud area.

Specifically we oppose any effort:

1. to exclude criminal fraud from RICO,
2. to add an "organized crime" limitation to RICO,
3. to add a criminal conviction limitation to RICO or
4. to make the burden of proof for private civil plaintiffs under RICO higher than preponderance of the evidence.

Specifically, we support any effort:

1. to clarify RICO to guarantee that private civil plaintiffs will be able to secure full equity relief, and
2. to clarify RICO to make more specific the offenses incorporated in it and to add appropriate offenses to the statute, particularly in light of comprehensive recent congressional legislation.

In addition, we would support the adoption of:

1. an express claim for treble damage relief for the federal government,
2. the clarification of the provisions for attorneys fees, where suits are settled,
3. the addition of an express statute of limitations, and
4. the addition of an express right on the part of the attorney general to intervene in private civil RICO litigation.

EXHIBIT A

STATE RICO SURVEY

		Federal	Hawaii	Pennsylvania	Florida	Arizona
ENACTED		Oct. 15, 1970	1972	June 6, 1973	Oct. 1, 1977	Oct. 1, 1978
AMENDED		Oct. 1, 1979		June 27, 1978 Dec. 4, 1980	June 23, 1979	April 27, 1980 1982
CRIMINAL ACTION	1. Proceeding allowed	Yes 18 § 1961	Yes § 842	Yes 18 § 911	Yes § 895	Yes § 13-2301
	2. Brought by					
	AG	NP	NP	Yes 911e(2)	NP	NP
	DA	NP	NP	Yes 911e(2)	NP	NP
	3. Court	NP	NP	NP	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1962(a)	Yes 842-2(1)	Yes 911b(1)	Yes 895.03(1)	Yes 2312A
	-investment or control through pattern or debt	Yes 1962(b)	Yes 842-2(2)	Yes 911b(2)	Yes 895.03(2)	Yes 2312A
	-participation through pattern or debt	Yes 1962(c)	Yes 842-2(3)	Yes 911b(3)	Yes 895.03(3)	Yes 2312B
	-conspiracy to do the above	Yes 1962(d)	NP	Yes 911b(4)	Yes 895.03(4)	NP
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excluding imprisonment 1961(5)	NP	2 rel., 1 after eff. date 911h(4)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 895.02(4)	NP
	6. Predicate offenses	Yes 1961(1)	Yes 842-1	Yes 911h(1)	Yes 895.02(1)	Yes 2301D(4)
	7. Person	Yes 1961(3)	Yes 842-1	Yes 911h(2)	NP	NP
	8. Enterprise	Yes 1961(4)	Yes 842-1	Yes 911h(3)	Yes 895.02(3)	Yes 2301D(2)
	9. State of mind	NP	NP	NP	NP	Knowing 2312C
SANCTIONS	10. Sanctions					
	-imprisonment	Up to 20yrs.1963(a)	Yes 842-3	Felony 1° 911c	Yes 895.04(1)	Class 3 fel. 2312C
	-fine	UpTo$25,000 1963(a)	Yes 842-3	Felony 1° 911c	Yes, up to 3x gain or harm 895.04(2)	Class 3 fel. 2312C
	-forfeiture	Yes 1963(a)	Yes 842-3	NP	NP	NP
	-costs	NP	NP	NP	Yes 895.04(2)	NP
	11. Injunctive relief					
	-restraining order	Yes 1963(b)	NP	NP	NP	Yes 2313
	-racketeering lien	NP	NP	NP	Yes 895.07	Yes 2313, 2314-C2
CIVIL SUIT	12. Proceeding allowed	Yes 1964	Yes 842-5, 3	Yes 911d	Yes 895.05	Yes 2314
	13. Brought by					
	-AG	Yes 1964(b)	Yes 842-5	Yes 911e(1)	Yes 895.05(5)	Yes 2314A
	-DA	NP	NP	NP	Yes 895.05(5)	Yes 2314 A,E
	-Private Party	Yes 1964(c)	Yes 842-3(c)	NP	Yes 895.05(6)	Yes 2314A
	14. Court	U.S. Dist. 1964(a)	Circuit 842-5	Courts of Common Pleas, Commonwealth Ct. 911d(1)	Circuit 895.05(1)	Superior 2314

	15. Burden of Proof					
	-law	NP	NP	NP	NP	Preponderance 2316I
	-equity	NP	NP	NP	NP	Preponderance 2316I
	16. Provision for innocent parties	Yes §1964(a)	Yes 842-8(a)	Yes 911d111	Yes 895.05(2)(c)	Yes 2314B
	17. Preliminary relief	Yes 1964(b)	Yes 842-6	Yes 911.12	Yes 895.05(5)(6)	Yes 2314C
	-bond requirement	NP	NP	NP	Yes 895.05(6)	NP
	-bond is an option	Yes 1964(b)	Yes 842-8(b)	Yes 911d2	Yes 895.05(5)(6)	Yes 2314C
	18. Showing for relief					
	-general	NP	NP	NP	Yes 895.05(6)	NP
	-no special	NP	NP	NP	Yes 895.05(6)	NP
	19. Scope of equitable relief					
	-divest	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(i)	Yes 895.05(1)(a)	Yes 2314D(1)
	-restrict	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(i)	Yes 895.05(1)(b)	Yes 2314D(2)
	-dissolve	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(ii)	Yes 895.05(1)(c)	Yes 2314D(3)
	-reorganize	Yes 1964(a)	Yes 842-8(a)	NP	Yes 895.05(1)(c)	Yes 2314D(3)
	-revoke permits	NP	Yes 842-5	Yes 911d(1)(ii)	Yes 895.05(1)(d)	NP
	-forfeit charter	NP	Yes 842-5	Yes 911d(1)(ii)	Yes 895.05(1)(e)	NP
	20. Scope of legal relief					
	-amount	3x 1964(c)	Damages 842-8(c)	NP	3x + punitive 895.05(7)	3x 2314A
	-costs	Yes 1964(c)	Yes 842-8(c)	NP	Yes 895.05(7)	Yes 2314A
	-attorney fees	Yes 1964(c)	Yes 842-8(c)	NP	Yes 895.05(7)	Yes 2314A
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(a),(b)
	-personal property	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(c)
	-money	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(c)
	-any substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 1968	Yes 842-10	Yes 911f	Yes 895.06	Yes 2315
	23. Seizure without process in certain instances	NP	NP	NP	Yes 895.05(3)	NP
	24. Relation back	NP	NP	NP	Yes 895.05(2)b	2316-021(1),(2)
	25. Jury trial	NP	NP	NP	Yes 895.05(7)e	NP
	26. Estoppel	Yes 1964(d)	Yes as to action by the State 842-8(d)	Yes 911d(3)	Yes 895.05(8)	Yes 2314F
	27. Intervention by State	NP	NP	NP	Yes 895.05(9)	Yes, but not in action by D.A. 2314K
	28. Civil suit not precluded by criminal action	NP	NP	NP	Yes 895.05(11)	Yes 2314M
	29. Priority of individual over State to compensation	NP	NP	NP	Yes 895.05(7)b	NP
	30. Need for investigation and prosecution	NP	NP	NP	NP	NP
	31. Reciprocity of enforcement	NP	NP	NP	NP	NP
	32. Statute of limitation	NP	NP	NP	5 yrs. suspended 895.05(10)	Yes 2314G
	33. Construction	Liberal PL 91-452 § 904	Fair Import 701-104	Fair Import 105	Strict 775.021	Fair Meaning 13-104
	34. Severability	NP	NP	NP	NP	NP
	35. Findings and Intent	Yes PL 91-452 § 1	NP	Yes 911a	NP	NP

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

[illegible]

		Rhode Island	New Mexico	Georgia	Indiana	New Jersey
ENACTED		1979	Feh. 28. 1980	July 1, 1980	1980	June 15, 1981
AMENDED				April 16, 1982		
CRIMINAL ACTION	1. Proceeding allowed	Yes 7-15	Yes 30-42	Yes 26-34[illegible]	Yes 35-45-6-1	Yes 2C:41-1
	2. Brought by					
	AG	NP	Yes 30-42-5	NP	NP	Yes 41-3(c)
	DA	NP	Yes 30-42-5	NP	NP	Pros.Atty. 41-1(g) when authorized
	3. Court	Superior 7-15-8	NP	NP	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 7-15-2(a)	Yes 30-42-4A	Yes 3403(a)	Yes -6-2(a)(1)	Yes 41-2(a)
	-investment or control through pattern or debt	Yes 7-15-2(b)	Yes 30-42-4B	Yes 3403(a)	Yes -6-2(a)(2)	Yes 41-2(b)
	-participation through pattern or debt	Yes 7-15-2(c)	Yes 30-42-4C	Yes 3403(b)	Yes -6-2(a)(3)	Yes 41-2(c)
	-conspiracy to do the above	NP	Yes 30-42-4D	Yes 3403(c)	NP	Yes 41-2(d)
	5. Pattern	NP	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 30-42-3D	2 rel., 1 after eff. date, 1 w/in 4 yrs. of prior excl. imprisonment 3402(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior -6-1(c)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment 41-1d(1),(2)
	6. Predicate offenses	Yes 7-15-1(a)	Yes 30-42-3A	Yes 3402(a),(b)	Yes -6-1(d)	Yes 41-1(a)
	7. Person	Yes 7-15-1(b)	Yes 30-42-3B	NP	NP	Yes 41-1(b)
	8. Enterprise	Yes 7-15-1(c)	Yes 30-42-3C	Yes 3402(c)	Yes -6-1(b)	Yes 41-1(c)
	9. State of mind	NP	NP	NP	Knowledge or Intent -6-2	NP
SANCTIONS	10. Sanctions					
	-imprisonment	Yes 7-15-3	Fel. 2° or 3° 30-42-3	Yes, 3404(a)	Class C Felony -6-2	1° w/gain 2° w/out 41-3(a)
	-fine	Yes 7-15-3	Fel. 2° or 3° 30-42-4A-D	Up to $25,000 or 3x gain to $25,000 3404(a),(b)	Class C Felony -6-2	1° with gain/ 41-3(a) 2° w/out gain 41-3(a)
	-forfeiture	Yes 7-15-3	Yes 30-42-4E	Yes via Civil Proc. 3405(a)	NP	Yes 41-3(b)
	-costs	NP	NP	NP	NP	NP
	11. Injunctive relief -restraining order	NP	Yes 30-42-4F	NP	NP	Yes 41-3(c)
	-racketeering lien	NP	Yes 30-42-4F	NP	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 7-15-4	Yes 30-42-5A	Yes 3405(a)	Yes 34-4-30.5	Yes 41-4
	13. Brought by					
	-AG	Yes 7-15-4(b)	Yes 30-42-6B	Yes 3405(f)(1)	NP	Yes 41-4(b)
	-DA	NP	Yes 30-42-6B	Yes 3405(f)(1)	ProsAtty -30.5-2	NP
	-Private Party	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3405(f)(1)	Yes -30.5-2	Yes 41-4(c)
	14. Court	Superior 7-15-4(a)	District 30-42-6A	Superior 3406(a)	Circuit or Superior -30.5-2	Superior 41-4(a)
	15. Burden of Proof					

	-Law	NP	NP	NP	Preponder.-30.5-2	NP
	-Equity	NP	NP	NP	Preponder.-30.5-2	NP
	16. Provision for innocent parties	Yes 7-15-4(a)	Yes 30-42-6C	Yes 3405(h)	Yes -30.5-2	Yes 41-4(a)
	17. Preliminary relief	Yes 7-15-4(b)	Yes 30-42-6C	Yes 3405(b)	Yes -30.5-5(a)	Yes 41-4(b)
	-harm requirement	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
	-bond is an option	Yes 7-15-4(b)	Yes 30-42-6C	Yes 3406(b)	Yes -30.5-5(a)	Yes 41-4(b)
	18. Showing for relief					
	-general	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
	-no special	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
	19. Scope of equitable relief*					
	-divest	Yes 7-15-4(a)	Yes 30-42-6D1	Yes 3406(a)(1)	Yes -30.5-2(1)	Yes 41-4(a)(1)
	-restrict	Yes 7-15-4(a)	Yes 30-42-6D2	Yes 3406(a)(2)	Yes -30.5-2(2)	Yes 41-4(a)(2)
	-dissolve	Yes 7-15-4(a)	Yes 30-42-6D3	Yes 3406(a)(3)	Yes -30.5-2(3)	Yes 41-4(a)(3)
	-reorganize	Yes 7-15-4(a)	Yes 30-42-6D3	Yes 3406(a)(3)	Yes -30.5-2(3)	Yes 41-4(a)(3)
	-revoke permits	NP	NP	Yes 3406(a)(4)	Yes -30.5-2(4)	Yes 41-4(a)(5)
	-forfeit charter	NP	NP	Yes 3406(a)(5)	Yes -30.5-2(5)	Yes 41-4(a)(4)
	20. Scope of legal relief					
	-amount	3x 7-15-4(c)	3x 30-42-6A	3x + punitive 3406(c)	3x + punitive 30.5-5(b)(1),(4)	3x 41-4(c)
	-costs	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3406(c)	Yes -30.5-5(b)(2)	Yes 41-4(c)
	-attorney fees	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3406(c)	Yes -30.5-5(b)(3)	Yes 41-4(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	NP	NP	Yes 3405(a)	Yes -30.5-3	Yes 41-3(b)(2)
	-personal property	NP	NP	Yes 3405(a)	Yes -30.5-3	Yes 41-3(b)(1)
	-money	NP	NP	Yes 3405(a)	NP	Yes 41-3(b)(1)
	-any substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 7-15-7	NP	NP	NP	Yes 41-5
	23. Seizure without process in certain instances	NP	NP	Yes 3405(d)(2)	Yes -30.5-4	NP
	24. Relation back	NP	NP	Yes 3405(e)(11)(A)	NP	NP
	25. Jury trial	NP	NP	Yes 3406(c)(1)	Yes -30.5-5(c)	NP
	26. Estoppel	Yes 7-15-4(d)	NP	Yes 3406(d)	Yes -30.5-6	Yes 41-4(d)
	27. Intervention by State	NP	NP	NP	NP	NP
	28. Civil suit not precluded by criminal action	NP	NP	Yes 3408	NP	Yes 41-4.1
	29. Priority of individual over State to compensation	NP	NP	Yes 3406(c)(2)	Yes -30.5-5(d)	NP
	30. Fund for investigation and prosecution	NP	NP	NP	NP	Yes 41-3(b)
	31. Reciprocity of enforcement	NP	NP	Yes 3409 *	NP	NP
	32. Statute of limitation	NP	NP	5 yrs. suspended 3407 *	NP	NP
	33. Construction	Liberal 7-15-10	Approved Usage 12-2-2	Fair Warning 26-102-b	Plain, ordinary usual sense 1-1-4-1	Liberal 41-6
	34. Severability	Yes 7-15-11	NP	NP	NP	Yes 41-6.2
	35. Findings and intent	NP	Yes 30-42-2	Yes 3401	NP	Yes 41-1.1

*NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

		Utah	Colorado	Idaho	Oregon	Wisconsin
ENACTED		July 1, 1981	1981	1981	1981	April 27, 1982
AMENDED						
CRIMINAL ACTION	1. Proceeding allowed	Yes 76-10-1601	Yes 18-17-101	Yes 18-7801	Yes 166.715	Yes 946.80
	2. Brought by					
	AG	NP	NP	NP	NP	Yes 946.87(3)
	DA	NP	NP	NP	NP	Yes 946.87(3)
	3. Court	NP	NP	NP	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1603(1)	Yes -104(1)	Yes 7804(a)	Yes .720(1)	Yes 946.83(1)
	-investment or control through pattern or debt	Yes 1603(2)	Yes -104(2)	Yes 7804(b)	Yes .720(2)	Yes 946.83(2)
	-participation through pattern or debt	Yes 1603(3)	Yes -104(3)	Yes 7804(c)	Yes .720(3)	Yes 946.83(3)
	-conspiracy to do the above	Yes 1604(4)	Yes -104(4)	Yes 7804(d)	Yes .720(4)	NP
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 1602(4)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment -103(3)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 7803(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior .715(3)	3 rel., 1 after eff. date, last within 7 yrs. of prior. Mult. acts at same time & place count as 1 act 946.82(3)
	6. Predicate offenses	Yes 1602(1)	Yes -103(5)	Yes 7803(c)	Yes .715(5)	Yes 946.82(4)
	7. Person	Yes 1602(2)	Yes -103(4)	Yes 7803(b)	Yes .715(4)	NP
	8. Enterprise	Yes 1602(3)	Yes -103(2)	Yes 7803(c)	Yes .715(2)	Yes 946.82(2)
	9. State of mind	NP	NP	NP	NP	NP
SANCTIONS	10. Sanctions					
	-imprisonment	2° Felony 1603(5)	Class 2 Fel.-105(1)	UpTo14 yrs. 7804(e)	ClassAFel.720(5)(a)	ClassC fel.946.84(1)
	-fine	2° Felony 1603(5)	up to $25,000 -105 (1)(a) up to 3x gain or harm-105(2)	UpTo$25,000 7804(e)	YesOrUp .730(5)(a) To 3x gain or harm .720(5)(b)	Up to 2x gain or loss 946.84(2)
	-forfeiture	Yes 1603(5)	Yes -105(1)(b)	Yes 7804(f)	Yes .725	Yes 946.84(2)
	-costs	NP	Yes with 3x fine or forfeiture -105(2) -105(6)(d)(II)	NP	Yes .720(5)(b)	Yes 946.84(2) greater penalties for "Continuing Criminal Enterprise" 946.85
	11. Injunctive relief -restraining order	Yes 1603(6)	Yes -105(5)	Yes 7804(g)	Yes .725	NP
	-racketeering lien	NP	NP	NP	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1605(1)	Yes -106(5)	Yes 7805	Yes .725	Yes 946.86
	13. Brought by					
	-AG	Yes 1605(1)	Yes -106(5)	Yes 7805(b)	Yes .725(5)	Yes 946.86(3)
	-DA	Yes 1605(1)	Yes -106(5)	Yes 7805(b)	Yes .725(5)	Yes 946.86(3)
	-Private Party	Yes 1605(1)	Yes -106(6)	Yes 7805(a)	Yes .725(6)	Yes 946.86(4)
	14. Court	District 1605(1)	District -106(1)	District 7805(c)	Circuit .725(1)	Circuit 946.86

	15. Burden of Proof					
	-Law	Preponder. 1605(2)	NP	NP	NP	Reasonable Certainty 946.86(5)
	-Equity	Preponder. 1605(2)	NP	NP	NP	Reas.Cert. 946.86(5)
	16. Provision for innocent parties	Yes 1605(2)	Yes -106(1)	Yes 7805(c)	Yes .725(1),(2)	Yes 946.86(1)
	17. Preliminary relief	Yes 1605(3)	Yes -106(6)	Yes 7805(c)	Yes .725(5)	Yes 946.86(3)
	-harm requirement	NP	Yes -106(6)	NP	NP	NP
	-bond is an option	Yes 1605(3)	Yes -105(6)	Yes 7805(c)	Yes .725(5),(6)	Yes 946.86(3)
	18. Showing for relief					
	-general	NP	Yes -106(6)	NP	NP	NP
	-no special	NP	Yes -106(4)	NP	Yes .725(6)	NP
	19. Scope of equitable relief					
	-divest	Yes 1605(4)(a)	Yes -106(1)(a)	Yes 7805(d)(1)	Yes .725(1)(a)	Yes 946.86(1)(a)
	-restrict	Yes 1605(4)(b)	Yes -106(1)(b)	Yes 7805(d)(2)	Yes .725(1)(b)	Yes 946.86(1)(b)
	-dissolve	Yes 1605(4)(c)	Yes -106(1)(c)	Yes 7805(d)(3)	Yes .725(1)(c)	Yes 946.86(1)(c)
	-reorganize	Yes 1605(4)(c)	Yes -106(1)(c)	Yes 7805(d)(3)	Yes .725(1)(c)	Yes 946.86(1)(c)
	-revoke permits	NP	Yes -106(1)(d)	Yes 7805(d)(5)	Yes .725(1)(d)	Yes 946.86(1)(d)
	-forfeit charter	NP	Yes -106(1)(e)	Yes 7805(d)(6)	Yes .725(1)(e)	NP
	20. Scope of legal relief					
	-amount	3x+punitive 1605(1)	3x -106(7)	3x 7805(a)	3x + punitive .725(7)(a)	2x + punitive 946.86(4)
	-costs	Yes 1605(1)	Yes -106(7)	Yes 7805(a)	Yes .725(7)(a)	Yes 946.86(4)
	-attorney fees	Yes 1605(1)	Yes -106(7)	Yes 7805(a)	Yes .725(7)(a)	Yes 946.86(4)
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 1606(2)	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
	-personal property	Yes 1606(2)	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
	-money	NP	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
	-any substitute other property if forfeited property is not available	Yes 1606(3)	NP	NP	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	Yes -107	NP	Yes .730	NP
	23. Seizure without process in certain instances	NP	Yes -106(3)	NP	Yes .725(3)	NP
	24. Relation back	NP	NP	NP	NP	NP
	25. Jury trial	NP	Yes -106(7)(a)	NP	Yes .725(7)(b)	Yes 946.86(4)
	26. Estoppel	Yes 1607	Yes -106(8)	NP	Yes .725(8)	Yes 946.86(6)
	27. Intervention by State	NP	NP	NP	Yes .725(9)	NP
	28. Civil suit not precluded by criminal action	NP	Yes -106(9)	NP	Yes .725(11)	Yes 946.87(2)
	29. Priority of individual over State to compensation	NP	Yes -106(7)(b)	NP	Yes .725(7)(c)	Yes 946.86(2)(b)
	30. Fund for investigation and prosecution	NP	NP	NP	NP	
	31. Reciprocity of enforcement	NP	NP	NP	NP	NP
	32. Statute of limitation	NP	NP	NP	5 yrs. suspended .725(10)	6 yrs. suspended 946.87(1)
	33. Construction	Fair import 76-1-106	Liberal -108	Liberal 73-102(1)	Liberal .735(2)	Reasonable interpret. 990.001
	34. Severability	NP	Yes -109	NP	NP	
	35. Findings and intent	NP	Yes -102	Yes 7802	NP	Yes 946.81

*NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

		Illinois**	California	Connecticut	North Dakota	Nevada
ENACTED		August 18, 1982	1982	1982	1983	July 1, 1983
AMENDED						
CRIMINAL ACTION	1. Proceeding allowed	Yes 56 1/2 §1651	Yes Penal § 186	Yes 53-393	Yes 12.1-06.1	Yes § 207.350
	2. Brought by					
	AG	Yes 1655 § 5(d)	Yes 186.2(c)	Yes -394(f)	NP	NP
	DA	Yes 1655 § 5(d)	Yes 186.2(c)	Yes -394(f)	NP	Pros. Atty. 207.430
	3. Court	NP	Superior186.5(c)(1)	Superior -398(a)	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1654 § 4(b)	NP	Yes -395(a)	NP	Yes 207.400(a)
	-investment or control through pattern or debt	Yes 1654 § 4(c)	NP	Yes -395(b)	Yes -06.1-03(1)	Yes 207.400(b)
	-participation through pattern or debt	Yes 1654 § 4(d)	NP	Yes -395(c)	Yes -06.1-03(2)	Yes 207.400(c)
	-conspiracy to do the above	NP	NP	NP	NP	Yes 207.400(h)
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior. At least 1 must be Class X, 1 or 2 Felony 1653 § 3(b)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment 186.2(b)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior -394(c)	NP	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 207.390
	6. Predicate offenses	Yes 1653§3(a)(1),(2	Yes 186.2(a)	Yes -394(a)	Yes -06.1-01(2)(d)	Yes 207.360
	7. Person	Yes 1653 § 3(c)	NP	Yes -394(d)	NP	NP
	8. Enterprise	Yes 1653 § 3(d)	NP	Yes -394(c)	Yes -06.1-01(2)(b)	Yes 207.370
	9. State of mind	NP	NP	NP	Knowing-06.1-03(3)	NP
SANCTIONS	10. Sanctions					
	-imprisonment	Class1 Fel.1655§5a1	NP	1-20 yrs. -397(a)	ClasBFel-06.1-03(3)	5-20 yrs. 207.400(2)
	-fine	Up to $100,000 1655 § 5(a)(2)	NP	or Up to $25,000 -397(a)	Class B Felony -06.1-03(3)	Up to $25,000 or 3x 207.400(2) gain/loss 207.410
	-forfeiture	Yes 1655§ 5(a)(3)	Yes 186.3, 186.7(a)	Yes -397(a)	NP	Yes 207.420
	-costs	NP	NP	NP	NP	Yes 207.410(2)
	11. Injunctive relief					
	-restraining order	Yes 1655 § 5(c)	Yes 186.6(a)	Yes -398(a)	Yes -06.1-04	Yes 207.430
	-racketeering lien	NP	NP	Yes -399(a), 402(c)	Yes -06.1-06	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1657 § 7	NP	NP	Yes -06.1-05(1)	Yes 207.470
	13. Brought by					
	-AG	Yes 1656 § 6(b)	NP	NP	Yes -06.1-05(1)	Yes 207.490(4)
	-DA	Yes 1656 § 6(b)	NP	NP	NP	Yes 207.490(4)
	-Private Party	Yes 1657 § 7	NP	NP	Yes -06.1-05(1)	Yes 207.470(1)
	16. Court	Circuit 1657 § 7	NP	NP	District-06.1-05(2)	District 207.470(3)

	15. Burden of Proof					
	-Law	NP	NP	NP	Preponder.-06.1-05	NP
	-Equity	NP	NP	NP	Preponder.-06.1-05	NP
	16. Provision for innocent parties	Yes 1656 §6(a)	NP	NP	Yes 06.1-05(2)	Yes 207.500(2)
	17. Preliminary relief	Yes 1656 §6(b)	NP	NP	Yes 06.1-05(3)	Yes 207.490(3)
	-bond requirement	NP	NP	NP	NP	NP
	-bond is an option	Yes 1656 §6(b)	NP	NP	Yes 06.1-05(3)	Yes 207.490(3)
	18. Showing for relief					
	-general	NP	NP	NP	NP	NP
	-no special	NP	NP	NP	NP	NP
	19. Scope of equitable relief					
	-divest	Yes 1656 §6(a)	NP	NP	Yes 06.1-05(4)(a)	NP
	-restrict	Yes 1656 §6(a)	NP	NP	Yes 06.1-05(4)(b)	NP
	-dissolve	Yes 1656 §6(a)	NP	NP	Yes 06.1-05(4)(c)	NP
	-reorganize	Yes 1656 §6(a)	NP	NP	Yes 06.1-05(4)(d)	NP
	-revoke permits	NP	NP	NP	NP	NP
	-forfeit charter	NP	NP	NP	NP	NP
	20. Scope of legal relief					
	-amount	3x 1656 §6(c)	NP	NP	3x 06.1-05(1)	3x 207.470(1)
	-costs	Yes 1656 §6(c)	NP	NP	Yes 06.1-05(1)	Yes 207.470(1)
	-attorney fees	Yes 1656 §6(c)	NP	NP	Yes 06.1-05(1)	Yes 207.470(1)
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 1655 §5(a)(3)	Yes 186.3(b),(c)	NP	Yes 06.1-05(4)(f)(1)	Yes 207.460(a)
	-personal property	Yes 1655 §5(a)(3)	Yes 186.3(b),(c)	NP	Yes 06.1-05(4)(f)(2)	Yes 207.460(a)
	-money	Yes 1655 §5(a)(3)	NP	NP	Yes 06.1-05(4)(f)(3)	Yes 207.460(a)
	-any substitute other property if forfeited property is not available	NP	NP	NP	Yes 06.1-05(4)(g)	Yes 207.420(3)
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	NP	NP	Yes 06.1-07	NP
	23. Seizure without process in certain instances	NP	NP	NP	NP	Yes 207.490(1)
	24. Relation back	NP	NP	NP	Yes 06.1-06	NP
	25. Jury trial	NP	NP	NP	NP	Yes 207.470(1)
	26. Estoppel	Yes 1656 §6(d)	NP	NP	Yes 06.1-05(6)	Yes 207.470(2)
	27. Intervention by State	NP	NP	NP	Yes 06.1-05(10)	Yes 207.490(4)
	28. Civil suit not precluded by criminal action	NP	NP	NP	Yes 06.1-05(13)	Yes 207.470(4)
	29. Priority of individual over State to compensation	NP	NP	NP	NP	Yes 207.470(1)
	30. Fund for investigation and prosecution	Yes 1655 5(g)	NP	NP	NP	NP
	31. Reciprocity of enforcement	NP	NP	NP	NP	NP
	32. Statute of limitation	NP	NP	NP	7 yrs 06.1-05(7)	5 years suspended 207.520
	33. Construction	Liberal 1658 § 8	NP	NP	Liberal 1-03-01	Fair import 193.030
	34. Severability	Yes 1659 § 9	NP	Yes -403(b)	NP	NP
	35. Findings and Intent	Yes 1652 § 2	Yes 186.1	NP	NP	NP

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

		Louisiana**	Mississippi	Washington		
ENACTED		July 22, 1983	July 1, 1984	January 1, 1985		
AMENDED						
CRIMINAL ACTION	1. Proceeding allowed	Yes 15:1351	Yes § 3	Yes § 12		
	2. Brought by					
	AG	NP	NP	Yes 15(1)(b)		
	DA	NP	NP	Yes 15(2)(b)		
	3. Court	NP	Circuit 5	Superior 13		
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1353(A)	Yes 3(1)	Yes 12(1)		
	-investment or control through pattern or debt	Yes 1353(B)	Yes 3(2)	Yes 12(2)		
	-participation through pattern or debt	Yes 1353(C)	Yes 3(3)	Yes 12(3)		
	-conspiracy to do the above	Yes 1353(D)	Yes 3(4)	Yes 12(4)		
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 1352(C)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 2(d)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment 1 (17)		
	6. Predicate offenses	Yes 1352(A)	Yes 2(a)	Yes 1 (16)		
	7. Person	NP	Yes(general) 1-3-39	NP		
	8. Enterprise	Yes 1352(B)	Yes 2(c)	Yes 1 (14)		
	9. State of mind	Knowing 1353(A)	Intent 3(1)	Knowing 12(1)		
SANCTIONS	10. Sanctions					
	-imprisonment	Up to 50yrs 1354(A)	Up to 20yrs 4(1)	Class B Fel. 12(5)		
	-fine	Up to $1,000,000 or 3x loss 1354(A) or gain 1354(B)	Up to $25,000 4(1) or 3x loss 4(2) or gain	Class B Fel. 12(5)		
	-forfeiture	Yes 1354(D)	Yes 4(4)	Yes 14(5), 14(4)(1)		
	-costs	Yes 1354(B)	Yes 4(2)	Yes 14(4)(e)		
	11. Injunctive relief					
	-restraining order	Yes 1356(D)	NP	Yes 14(3)		
	-racketeering lien	NP	NP	Yes 16		
CIVIL SUIT	12. Proceeding allowed	Yes 1356	Yes 5	Yes 14		
	13. Brought by					
	-AG	NP	Yes 5(6)	Yes 14(10)		
	-DA	Yes 1356(D)	Yes 5(4)	Yes 14(10)		
	-Private Party	Yes 1356(E)	Yes 5(5)	Yes 14(1)		
	14. Court	District 1356(D)	Circuit 5(1)	Superior 14(2)		

	15. Burden of Proof					
	-Law	NP	NP	Preponderance 14(9)		
	-Equity	NP	NP	Preponderance 14(9)		
	16. Provision for innocent parties	Yes 1356(A)(2)	Yes 5(1)	Yes 14(2)		
	17. Preliminary relief		Yes 5(4)	Yes 16(3)		
	-harm requirement	NP	NP	NP		
	-bond is an option	Yes 1356(D)	Yes 5(4)	Yes 14(3)		
	18. Showing for relief					
	-general	NP	Yes 5(5)	NP		
	-no special	NP	Yes 5(5)	NP		
	19. Scope of equitable relief					
	-divest	NP	Yes 5(1)(a)	Yes 14(4)(a)		
	-restrict	NP	Yes 5(1)(b)	Yes 14(4)(b)		
	-dissolve	NP	Yes 5(1)(c)	Yes 14(4)(c)		
	-reorganize	NP	Yes 5(1)(c)	Yes 14(4)(c)		
	-revoke permits	NP	Yes 5(1)(d)	NP		
	-forfeit charter	NP	Yes 5(1)(e)	NP		
	20. Scope of legal relief					
	-amount	3x or $10,000 1356(E)	3x + punitive 5(6)	3x 14(1)		
	-costs	Yes 1356(E)	Yes 5(6)	Yes 14(1)		
	-attorney fees	Yes 1356(E)	Yes 5(6)	Yes 14(1)		
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 1356(A)(1)	Yes 5(2)	Yes 14(f)(i)		
	-personal property	Yes 1356(A)(1)	Yes 5(2)	Yes 14(f)(i)		
	-money	Yes 1356(A)(1)	Yes 5(2)	Yes 14(f)(iii)		
	-any substitute other property if forfeited property is not available	NP	NP	Yes 14(g)		
PROCEDURE AND PRIORITY	22. Civil investigative demand (subpoena and/or interrogatory)	NP	NP	NP		
	23. Seizure without process in certain instances	Yes 1356(B)	Yes 5(3)	NP		
	24. Relation back**	NP —	NP	Yes 16(9)		
	25. Jury trial	NP	Yes 5(8)(a)	NP		
	26. Estoppel	Yes 1356(F)	NP	Yes 14(6)		
	27. Intervention by State	Yes 1356(G)	Yes 5(7)	Yes, w/certification by AG 14(11)		
	28. Civil suit not precluded by criminal action	Yes 1356(I)	Yes 5(9)	Yes 14(13)		
	29. Priority of individual over State to compensation	Yes 1356(A)(1)	Yes 5(8)(b)	NP		
	30. Fund for investigation and prosecution	Yes 1356(A)(3)	NP	Yes 15		
	31. Reciprocity of enforcement	NP	NP	NP		
	32. Statute of limitation	5 years suspended 1356(H)	5 yrs. 5(8)	7 yrs. 14(7)		
	33. Construction	Fair import 14:3	Common Meaning 1-3-65	Fair import 9A.04.020(2)		
	34. Severability	NP	Yes(general) 1-3-77	Yes 20		
	35. Findings and intent	NP	NP	NP		

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

EXHIBIT B

The Racketeer Influenced and Corrupt Organizations Statute

WHEREAS, Congress enacted in 1970 the Racketeer Influenced and Corrupt Organization provisions (Title IX) of the Organized Crime Control Act; and

WHEREAS, Title IX is applicable to patterns of racketeering activity involving:

1. personal violence;
2. provision of illegal goods and services;
3. corruption in private or public life; and
4. various forms of fraud; and

WHEREAS, Title IX provides important new criminal and civil sanctions to protect victims of patterns of racketeering activity, including:

1. criminal forfeiture of proceeds of racketeering activity;
2. criminal forfeiture of interests in enterprises;
3. equitable relief for the government;
4. equitable relief for victims of racketeering activity; and
5. treble damages, costs, and attorney's fees for victims of racketeering activity; and

WHEREAS, twenty-two states have enacted legislation patterned after Title IX; and

WHEREAS, other states are actively considering the passage of legislation patterned after Title IX; and

WHEREAS, states and local units of government have begun to make effective use of Title IX and state legislation patterned after it; and

WHEREAS, Title IX provides important new sanctions in the area of fraud against state and local units of government; and

WHEREAS, fraud against state and local government has a multi-billion dollar annual import; and

WHEREAS, state and local units of government have found that Title IX and state legislation patterned after it are effective and essential means of redressing wrongs;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General supports efforts by states to enact legislation patterned after Title IX and to strengthen the criminal and civil provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the National Association of Attorneys General opposes efforts to repeal or modify, in whole or in part, the provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the Executive Director and General Counsel of the National Association of Attorneys General is authorized to transmit this Resolution to appropriate committees of Congress, the Administration, and other appropriate individuals and associations.

EXHIBIT C

The Racketeer Influenced and Corrupt Organizations Statute

WHEREAS, Congress enacted in 1970 the Racketeer Influenced and Corrupt Organization provisions (Title IX) of the Organized Crime Control Act; and

WHEREAS, Title IX is applicable to patterns of racketeering activity involving:

1. personal violence;
2. provision of illegal goods and services;
3. corruption in private or public life; and
4. various forms of fraud; and

WHEREAS, Title IX provides important new criminal and civil sanctions to protect victims of patterns of racketeering activity, including:

1. criminal forfeiture of proceeds of racketeering activity;
2. criminal forfeiture of interests in enterprises;
3. equitable relief for the government;
4. equitable relief for victims of racketeering activity; and
5. treble damages, costs, and attorney's fees for victims of racketeering activity; and

WHEREAS, twenty-two states have enacted legislation patterned after Title IX; and

WHEREAS, other states are actively considering the passage of legislation patterned after Title IX; and

WHEREAS, states and local units of government have begun to make effective use of Title IX and state legislation patterned after it; and

WHEREAS, Title IX provides important new sanctions in the area of fraud against state and local units of government; and

WHEREAS, fraud against state and local government has a multi-billion dollar annual import; and

WHEREAS, state and local units of government have found that Title IX and state legislation patterned after it are effective and essential means of redressing wrongs;

NOW, THEREFORE, BE IT RESOLVED, that the National District Attorneys Association supports efforts by states to enact legislation patterned after Title IX and to strengthen the criminal and civil provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the National District Attorneys Association opposes efforts to repeal or modify, in whole or in part, the provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the Executive Director and General Counsel of the National District Attorneys Association are authorized to transmit this Resolution to appropriate committees of Congress, the Administration, and other appropriate individuals and associations.

EXHIBIT D

Defense Contractors under investigation by the Pentagon and the allegations involved.

1. McDonnell Douglas Corporation, cost mischarging.
2. Rockwell International Corporation, cost and labor mischarging.
3. General Dynamics Corporation, cost mischarging, subcontractor kickbacks, labor mischarging, product substitution, security compromise, defective pricing, cost duplication, false claims.
4. Lockheed Corporation, labor mischarging.
5. Boeing Company, cost mischarging, supply accountability, labor mischarging.
6. General Electric Company, false claims, defective pricing, labor cost mischarging, product substitution.
7. United Technologies Corporation, gratuities, subcontractor kickbacks, cost mischarging, bribery, defective pricing.
8. Raytheon Company, labor mischarging, product substitution.
9. Litton Industries, bribery and subcontractors kickbacks, labor mischarging, false claims, bid-rigging, cost mischarging.
10. Grumman Corporation, cost mischarging.
11. Martin Marietta Corporation, subcontractor kickbacks, cost mischarging.
12. Westinghouse Electric Corporation, cost mischarging.
13. Sperry Corporation, labor mischarging, cost mischarging, defective pricing.
14. Honeywell, Inc., diversion of Government property, bid rigging.
15. Ford Motor Company, defective pricing, labor mischarging, falsification of performance records.
16. Eaton Corporation, conflict-of-interest gratuities, cost mischarging.

17. TRW, Inc., defective pricing, cost mischarging.

18. Texas Instrument, Inc., product substitution.

19. Northrop Corporation, labor mischarging, false progress payments.

20. Avco Corporation, subcontractor kickbacks, cost mischarging.

21. Textron, Inc., cost mischarging.

22. Allied Corporation, conflict of interest.

23. Tenneco, Inc., cost mischarging.

24. GTE Corporation, unauthorized acquisition and utilization of classified data, labor mischarging.

25. Sanders Associates, Inc., unauthorized release of contract information.

26. Motorola, Inc., labor mischarging.

27. Congoleum Corporation, mischarging, gratuities theft.

28. Harris Corporation, defective pricing.

29. Gould, Inc., cost mischarging.

30. Emerson Electric Company, cost mischarging, gratuities cost mischarging.

31. John Hopkins University, civilian health and medical program of the uniformed services fraud.

32. Tracor, Inc., product substitution.

33. Lear Siegler, Inc., product substitution.

34. Fairchild Industries, gratuities, production substitution, cost mischarging, false statements.

35. Dynalectron Corporation, cost mischarging.

36. Todd Shipyard Corporation, noncompliance with contract.

The names of the remaining 9 defense firms under investigation were not released because they had not been informed of the investigation. N.Y. Times, June 22, 1985 at 25.

EXHIBIT E

§ 1961. Definitions

As used in this chapter -

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, prostitution involving minors, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: Chapter 51 (Homicide), Chapter 73 (obstruction of justice), and Chapter 110 (Sexual Exploitation of Children), section 32 (relating to destruction of aircraft or aircraft facilities), section 112 (relating to protection of foreign officials and other persons), section 115 (relating to assaults and other acts against federal and other persons), section 201 (relating to bribery), section 215 (relating to bank bribery), section 224 (relating to sports bribery), section 373 (relating to solicitation to commit a crime of violence), sections 471, 472, and 473 (relating to counterfeiting), section 510 (relating to fraud on Treasury or other securities), section 511 (relating to forgery of state and other securities), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 666 (relating to theft or bribery in benefit programs), section 844 (relating to explosive materials), sections 891-894 (relating to extortionate credit transactions), section 1029 (involving fraud in connection with access devices), section 1030 (involving fraud in connection with computers), section 1084 (relating to the transmission of gambling information), section 1203 (involving hostage taking), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (involving bank fraud), section 1503 ~~(relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement)~~, sections 1461-1465 (relating to obscene matter), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1952A (involving murder-for-hire), section 1952B (involving violent crime in aid of racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relat-

ing to interstate transportation of stolen property), section 2318 (relating to counterfeit materials), section 2320 (relating to counterfeit materials), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under Title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud ~~connected with a case~~ under Title 11, involving fraud ~~fraud in the sale of securities~~ under Securities Act of 1933 (15 U.S.C. § 77x), Securities Exchange Act of 1934 (15 U.S.C. § 78ff), Public Utility Holding Company Act of 1935 (15 U.S.C. § 79z-3), Trust Indenture Act of 1939 (15 U.S.C. § 77yyy) Investment Company Act of 1940 (15 U.S.C. § 80a-49), Investment Company Act of 1940 (15 U.S.C. § 80b-17), or the Commodity Exchange Act (7 U.S.C. § 13), ~~or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States~~ any offense under the Controlled Substance Act or the Controlled Substances Import and Export Act, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

X X X

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity that:

(A) are related to the affairs of enterprise,

(B) are not isolated; and

(C) are not so closely related to each other and connected in point of time and place that, while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation, they constitute a single transaction involving only one victim not evincing continuity of activity.

§ 1964. Civil remedies

(a) In any action or proceeding instituted under this section, the district courts of the United States shall have jurisdiction, to prevent and restrain violations of section 1962 of this chapter, shown by a preponderance of evidence, by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making the due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under subsection (a) of this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) ~~Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.~~ Any person may institute proceedings under subsection (a) of this section. In any proceeding bought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage, including the possibility that any judgment for money damages might be difficult to execute, in other cases, but no showing of special or irreparable injury shall have to be made. Upon the execution in the discretion of the court of a proper bond against damages for an injunction improvidently granted, a temporary restraining order and a preliminary injunction may be issued in any action or proceeding before a final determination thereof upon its merits. Such undertaking shall not be required when the applicant is a State or Territory of the United States. Recovery, if the person substantially prevails, shall include the costs of the action, including a reasonable attorney's fee in the trial and appellant courts.

(d) ~~A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.~~ Whenever the United States is, directly or indirectly, injured in its business or property by reason of any violation of section 1962 of this chapter, the Attorney General may bring a civil action in an appropriate district court of the United States and shall recover threefold the actual damages sustained by it, and the cost, including investigations and litigation, of the action.

(e) Any person who is, directly or indirectly, injured, shown by a preponderance of the evidence, by reason of any violation of section 1962 of this chapter may bring a civil action in an appropriate district court of the United States and shall recover threefold the actual damages sustained by him, and if the person substantially prevails, the costs of the action, including a reasonable attorney's fee in the trial and appellate courts. Damage shall not include pain and suffering. Damages shall not be limited to competitive or distinct injury.

(f) If the court determines that the filing of any pleading, motion, or paper under the subsections (c) or (e) of this section was frivolous or that any action or proceeding was brought or continued under subsections (c) or (e) of this section for any vexatious or other improper purpose, it shall award treble actual costs, including attorney's fees.

(g) Upon the filing of a civil action or proceeding under subsection (c) or (e) of this section, the person filing the action or proceeding shall immediately notify the Attorney General in such manner as he shall direct by regulations. The United States may upon timely application intervene in any civil action or proceeding brought under subsections (c) or (e) of this section, if the Attorney General certifies that in his opinion the case is of general public importance. In such action or proceeding the United States shall be entitled to the same relief as if it had instituted the action or proceeding.

(h) A final judgment or decree rendered in favor of the United States in any criminal proceeding or action or in favor of the United States or of any plaintiff or a defendant in any civil action or proceeding shall estop the defendant in any subsequent civil proceeding as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

(i) Notwithstanding any other provision of law providing a shorter period of limitation, any civil action or proceeding under subsections (c) or (e) of this section, shall be barred unless it is commenced within five years after the cause of action accrued. Whenever any civil or criminal action or proceeding is brought or intervened in by the United States to prevent, restrain, or punish any violation of section 1962 of this chapter, the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsections (c) and (e) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.

EXHIBIT F

STATUTES DEALING WITH ORGANIZED CRIMINAL ACTIVITY

SINCE 1930s:

NOT LIMITED TO ORGANIZED CRIME

1. 18 U.S.C. § 224 (1963) (sports bribery); *United States* v. *Walsh*, 544 F.2d 156, 159 (4th Cir. 1976) (no o.c.), *cert. denied*, *sub nom.*, *Bishop* v. *United States*, 429 U.S. 1093 (1977).

2. 18 U.S.C. §§ 841-48 (1970) (explosives) (Title XI OCCA); *United States* v. *Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979) (no o.c.).

3. 18 U.S.C. §§ 891-94 (1964) (loansharking); *United States* v. *Keresty*, 465 F.2d 36, 43 (3rd Cir.) (no o.c.), *cert. denied*, 409 U.S. 991 (1972).

4. 18 U.S.C. § 1510 (1967) (obstruction of criminal investigation); *United States* v. *Koehler*, 544 F.2d 1326, 1330 n. 6 (5th Cir. 1977) (no o.c.).

5. 18 U.S.C. § 1951 (1934, 1946) (extortion); *United States* v. *Culbert*, 435 U.S. 371, 374 (1978) (no racketeering).

6. 18 U.S.C. § 1952 (1961) (Travel Act); *United States* v. *Nardello* 393 U.S. 286, 296 (1969) (blackmail); *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972) (no newspaper exception); *Perrin* v. *United States*, 444 U.S. 37, 46 (1979) (private bribery); *United States* v. *Wander*, 601 F.2d 1251, 1257-58 (3d Cir. 1979) (no o.c.).

7. 18 U.S.C. § 1953 (1961) (lottery tickets); *United States* v. *Fabrizio*, 385 U.S. 263, 265-67 (1966) (no o.c.).

8. 18 U.S.C. § 1955 (1970) (business of gambling) (Title VII OCCA); *United States* v. *Box*, 530 F.2d 1258, 1265 n. 19 (5th Cir. 1976) (no o.c.).

9. 18 U.S.C. § 1961 (1970) (RICO) (Title IX OCCA); *United States* v. *Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977) (not status).

10. 18 U.S.C. § 2113(b) (1934, 1937) (bank robbery); *Bell* v. *United States*, 103 S. Ct. 2398, 2400-02 (1983) (not limited to gangsters).

11. 18 U.S.C. § 3575 (1970) (SDO) (Title X of OCCA); *United States* v. *Schell*, 692 F.2d 672, 674 (10th Cir. 1982 (no o.c.).

EXHIBIT 6

VOLUME 114

Mr. McCLELLAN. Mr. President, the amendment would require that any order—I am very serious about this—authorizing or approving the interception of wire or oral communications must be directly related to an investigation of organized crime.

The main thrust of title III is directed at organized crime, subversive activities, and other serious crimes. Each of the crimes contained in title III for which an electronic surveillance or order may be obtained has been selected because it is either serious in itself or characteristic of organized crime or subversives.

Mr. President, we note that in three or four instances this morning, the Senate has added several additional crimes to this bill which the committee did not include because it felt that this modern technique is essential to combat the crime situation in this country.

Each crime contained in title III for which an electronic surveillance or order may be obtained has been selected because it is either serious in itself or characteristic of organized crime or subversives. Amendment No. 778 ignores this rationale, when it would restrict all investigations of organized crime.

Mr. President, this is a Department of Justice amendment, and the present Attorney General opposes every part of this title except that which would give him and the President the power to tap wherever they think it is necessary for them to do so. The Attorney General opposes the remainder of the title; and, of course, it is not surprising that he sends an amendment here to destroy the effectiveness of the bill.

There is, for example, no relationship between organized crime and the Atomic Energy Act, espionage, sabotage, or treason. There is no relation between organized crime and riots. You could not bug a room or a hall in which Carmichael was meeting, in which Rap Brown was meeting, where they were inciting to riot, telling people to get their guns, "Go get whitey," and do this and do that. Do you want to take that out of the bill? It could not be said that that was organized crime.

These are just illustrations of what is intended. Perhaps the Senator does not understand it that way, but that is what the Justice Department wants to do. It simply wants to gut this bill. It does not want it at all. It has been fighting it and still is fighting it. The present Attorney General does that notwithstanding the fact that every other Attorney General including the father of the present Attorney General, since 1931, I believe—for approximately 35 or 36 years—has recommended legislation of this nature. We are only now getting around to it.

Yet, amendment No. 778 would require such a relation to be shown. This would end its impact as a court order system in the national security area. Under this amendment, if you had information that someone was plotting to assassinate the President, you would have to show, before you get an order, that he is associated with organized crime. I do not understand an amendment designed to go that far. We are not requiring that. We are giving discretion to the President, to act under the court order system in the national security area. This is essential.

Outside the area of subversion, there are other serious defects. Amendment No. 778 would permit only "organized crime kidnaping" to be investigated with electronic surveillance techniques. If you could not show that an organized crime ring was engaged in kidnaping, you could not get an order in a kidnaping case. Mr. President, this whole thing is destructive, and I believe that is what the Justice Department intended it to be. Can this be justified? How could this be explained to the mother of a small child? Kidnaping requires the use of these techniques without regard to the presence or absence of organized crime.

I think it would be true, too, in the case of murder if there were information of a plot.

What is organized crime? We speak of it generally in terms of some national organization or some organization that spreads out. Sometimes it is local. We might have operating here in Washington a small ring of one dozen people involved in organized crime since it is operating a car theft ring. In a sense that is organized crime. However, ordinarily when speaking of organized crime we think of the Mafia and syndicates.

This is certainly the most charitable thing that can be said about it. The whole effect would be to so completely confuse the matter that there would be no certainty that Congress intended what was done.

Rioting requires the use of the techniques without regard to the existence of organized crime. As I said a moment ago I do not know whether we are free from future riots. I do not say that we are going to have them. No one knows. I do say that every effort, every protection, every instrumentality that is within the Constitution should be made available to law enforcement officers to try to prevent the planning for rioting if any such thing is going on and to try to prevent rioting from happening.

But there is another, deeper objection to this amendment. It sets up a double standard which embodies guilt by association. Traditionally Anglo-American jurisprudence has dealt with a man's acts—not his associates or social status. We talk about "white collar" crime, but we prohibit tax evasion and price fixing. We talk about "street crime" but we prohibit rape, robbery, and assault. We talk about "organized crime" but prohibit narcotics and extortion.

With respect to narcotics, we may have one man in Washington who has a contact with the source of heroin and he has heroin shipped into this country. He may have a dozen people working for him, but he may not work in another city. Is that organized crime? I do not know. I do say that we should have the right, and law enforcement officers should be given this instrumentality, to ferret out and detect that crime.

Under amendment No. 778, one murderer would be treated differently from another, and the basis for the distinction would not be his acts committed in violation of some law, but his relationship with other people.

The aim of the amendment is obviously to strike a blow at organized crime and, at the same time, protect privacy. Yet, just as obviously, it will introduce in our legal theory a new distinction which will in the long run be a cure far worse than the disease

Amendment No. 778 would inject an extremely general and artificial standard for determining whether or not a surveillance order should be authorized. Title III is specific in this regard. You must have probable cause regarding a particular individual committing a specific offense. Under title III, the approach is to select the traditional crime categories, such as murder or extortion, in which organized crime is very active. However, these offenses are committed often by people who are not engaged in organized crime.

Mr. President, can you imagine the showing a law enforcement officer would have to make to obtain an order under amendment No. 778? Not only would he have to show probable cause that a particular suspect was committing a specific crime, as under title III, but also that the suspect was a member of an association, and that such association was engaged in certain illegal activities, and further that the suspect's particular crime must be directly related to the association's illegal activities. This amendment has the effect of requiring an officer to show what the surveillance will give before he can get an order for surveillance. It is because of the difficulty of getting proof in these areas that we are authorizing the use of these techniques in the first place. You may also rest assured that each of these requirements would be the subject of endless motions to suppress.

We might ask what kind of evidence the Senator would accept as proving his standard. I do not question the Senator's good intention. However, it should be rejected as artificial, cumbersome, and, in the long run, unworkable. Finally, it is destructive. The Department of Justice does not want the provisions of this bill at all, except with respect to the President.

Mr. President, I earnestly urge Senators to reject this amendment.

EXHIBIT H

VOLUME 116

35344 CONGRESSIONAL RECORD — HOUSE *October 7, 1970*

Mr. POFF.

Mr. Chairman, enactment of the provisions of S. 30 will certainly assure that that objective may be achieved without the necessity of attempting to make Mafia membership itself a crime.

The curious objection has been raised to S. 30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

Nevertheless, this line of analysis has a certain superficial plausibility. But if we make a closer examination we see that it is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new lesson derived from that reexamination. For example, our examination of how organized crime figures have achieved immunity from legal accountability led us to examine the sentencing practices and powers of our Federal courts. There we found that now our Federal judges, unlike State judges, have no statutory power to deal with organized crime leaders as habitual offenders and give them extended prison terms. Having noted the lack of habitual offender provisions by considering one class of cases, we obviously learned that it was lacking in other classes, too. Is there any good reason why we should not move to meet that need across the board?

The objection, moreover, has practical as well as theoretical defects. Even as to titles of S. 30 needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases. Many of those provisions, such as title I, deal with the process of investigating and collecting evidence. When an investigation begins, one cannot expect the police to be able to demonstrate a connection to organized crime, or even to know that a connection exists. It is only at the conclusion of the investigation that organized crime involvement can be shown and verified. Therefore, to require a general showing that organized crime is involved as a predicate for the use of investigative techniques would be to cripple those techniques.

Lastly, and most disturbingly, however, this objection seems to imply that a double standard of civil liberties is permissible. S. 30 is objectionable on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberties in particular, this objection is indeed strange. Have they forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases. If the bill violates the civil liberties of those engaged in organized crime, it is objectionable as such. But if it does not violate the civil liberties of those who are engaged in organized crime, it does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime.

Although I do not criticize, by implication or otherwise, the gentleman's motivation, I must oppose the amendment.

EXHIBIT I

Illustrative RICO Litigation

ARIZONA
FLORIDA
NEW MEXICO
OREGON

ARIZONA ORGANIZED CRIME PROJECT
PROSECUTION OF RACKETEERING OFFENSES

Statistical Report

October 1, 1978 - December 31, 1984

ARIZONA ORGANIZED CRIME PROJECT
PROSECUTION OF RACKETEERING OFFENSES

Statistical Report
October 1, 1978 - December 31, 1984

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I. INTRODUCTION:

For purposes of these statistics only cases which actually charge the offense of racketeering (RICO)* are included. Arizona RICO remedies also are available anytime a predicate criminal offense is committed for financial gain -- even though racketeering is not charged. See A.R.S. § 13-2301(D)(4) (which contains a list of predicate felony offenses). Occasionally this office has brought a prosecution, not charged the offense of racketeering, but gave notice it might seek RICO remedies. E.g. State v. Romo, CR-7481-C (Gila County). These cases have not been included where RICO remedies were not applied.

The Arizona Attorney General may bring a RICO action as a civil action, a criminal prosecution, or both. There are various advantages and disadvantages in proceeding under either form of action. RICO remedies are available whether the case is brought as a civil action or a criminal action.

Under Arizona law, A.R.S. § 13-807 (B), all fines or costs collected in any court for offenses indicted by a State Grand Jury or for other offenses prosecuted by the Attorney General are paid into the Anti-Racketeering Revolving Fund established in A.R.S. § 13-2314.01. For purposes of this report, only the amounts assessed are given.

Under the federal RICO law the RICO remedies are mandatory -- if a defendant is convicted of a RICO charge the judge's discretion is limited. For example, under Federal law upon a RICO conviction a judge shall apply forfeiture, restrain- ing orders, treble damages and award costs. See 18 U.S.C. § 1961 et seq. However, under Arizona law the RICO remedies are broader but their applicaton is discretionary with the court. A judge need only apply those remedies he believes are appropriate. Ariz.Rev.Stat.Ann. §§ 13-2313 and 2314. Those remedies include:

1. Treble damages and costs of investigation and prosecution including reasonable attorney's fees .

2. Restraining orders or other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints as the court deems proper.

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* Ariz.Rev.Stat.Ann. § 13-2312: Illegal control of an enterprise and illegally conducting an enterprise.

3. Divesture of interests in an enterprise.

4. Imposition of reasonable restrictions on the future activities or investments of any person.

5. Orders of dissolution or reorganization of any enterprise.

6. Forfeiture of certain property.

In addition, if a person is convicted in a criminal prosecution charging RICO, a court could incarcerate the person in prison for up to 20 years where the person has prior convictions and fine the person up to $150,000. If predicate offenses are charged, the person could receive an additional sentence and fine on each of those offenses for which the person stands convicted.

In several cases where the Attorney General has filed a civil RICO action, he has not also charged RICO in their related criminal prosecution, but merely charged the predicate offenses. E.g., State v. Williams, CR-131528 (16 years imprisonment) State v. Kupperman, CR-133963 (4 years imprisonment). Conversely when the crime of racketeering is charged in the criminal prosecution, the Attorney General might not file a civil racketeering case. E.g., State v. Tison, CR-10951 and State v Turlington, CR-11004 (pending see below).

II

STATISTICAL SUMMARY

CIVIL PROSECUTIONS

Judgments Awarded	$16,189,814.27
Collections	329,836.55
Assets Secured by Judicial Process	5,430,500.00

CRIMINAL PROSECUTIONS

RICO Charged/Remedies Sought	$ 1,966,928.00
Fines/Costs Assessed	815,122.00
TOTAL	$25,732,200.82

II. JUDGMENT AWARDS - Civil Prosecutions

		Restitution	Costs/ Penalties
1.	State v. Wholesale Motors (FFD79-055)	$ 11,250.00	$5,651.40
2.	State v. Jaynes (CIV 3644)	24,750.00	13,170.00
3.	State v. Bransen (FFD80-044)	95,923.69	173,825.00
4.	State v. Evans (Intergem I) (FFD79-078)	59,943.52	119,887.04
5.	State v. Intergem (Intergem II) (FFD79-072)		
	Gerken	592.40	500.00
	Page	275.00	500.00
	Taylor	3,447.41	12,000.00
	Lavato	1,735.00	5,500.00
	Adams	1,700.00	250.00
	Martinez	32,684.63	100,000.00
6.	State v. Resort Development (FFD79-077)		
	RDS, Salestrom, Blok	113,309.55	14,459.79
	von Furstenrecht	10,000.00	3,500.00
7.	State v. Herrin (FFD80-141)	23,366.00	99,006.00
8.	State v. Newman (FFD80-030)	240.00	2,000.00
9.	State v. Jewel Box (FFD80-207)		57,545.50
10.	State v. Buckner (FFD81-353)		26,752.12
11.	State v. Buckner (FFD81-267)		
	Lane		7,471.25
	Buckner		501,089.00
	Villa		50,000.00
	Pristo		75,000.00

JUDGMENT AWARDS - Civil Prosecutions Continued

		Restitution	Costs/ Penalties
12.	State v. Royal Cambridge Enter. (FFD80-293)	165,600.00	104,100.00
13.	State v. Hovic Corporation (FFD81-058)	573,000.00	595,935.55
14.	State v. Zucker (FFD82-020)		212,000.00[1]
15.	State v. Grosso (FFD80-291)	692,340.00	59,000.00
16.	State v. Williams (FFD81-408)	4,228,575.00	1,544,693.00
17.	State v. Dun Ler (FFD82-070)		
	Carroll		140,000.00
	West		2,000.00
	Greehling	1,985,875.01	197,404.54[2]
18.	State v. International Silver (FFD80-326)	3,104,639.34	575,337.27
19.	State v. General AZ Clearing House (FFD80-064)	143,405.96	70,000.00
20.	State v. Kuperman (FFD82-046)		
	Kuperman/Rabich	25,000.00	75,000.00
	Tubin	5,000.00	5,000.00
21.	State v. Minnesota Title & Trust (FFD81-081)		
	Laga		3,583.30
22.	State v. Samaniego (FFD83-157)		
	Johnson		35,000.00
	TOTAL	11,302,652.51	4,887,161.76

COLLECTIONS - Civil Prosecutions	Amount Paid
1. *State v. Jaynes* (CIV 3644)	37,920.00
2. *State v. Intergem* (FFD79-072)	
Gerken	100.00
Page	837.50
Adams	1,200.00
3. *State v. Newman* (FFD80-030)	2,240.00
4. *State v. Jewel Box* (FFD80-207)	57,545.00
5. *State v. Hovic Corp.* (FFD81-058)	63,000.00
6. *State v. Buckner* (FFD81-267)	
Lane	1,007.25
Villa	500.00
7. *State v.Zucker* (FFD82-020)	800.00[1]
8. *State v. Grosso* (FFD80-291)	119,000.27
9. *State v. Williams* (FFD81-408)	28,747.51
10. *State v. Kuperman* (FFD82-046)	
Tubin	4,250.00
Kuperman/Rabich	11,500.00
11. *State v. Dun Ler* (FFD82-070)	
Carroll	350.00
West	839.02
Total	329,836.55

Assets Secured by Judicial Process (TRO, Injunction, Receiversh

Lien, etc.)

1.	*State v. Grosso* (FFD80-291)	2,700,000.00
2.	*State v. Buckner* (FFD81-267)	26,500.00
3.	*State v. Buckner* (FFD81-353)	100,000.00
4.	*State v. Williams* (FFD81-408)	400,000.00
5.	*State v. International Silver* (FFD80-326)	130,000.00
6.	*State v. Cara Brock* (FFD82-133)	624,000.00
7.	*State v. Tocco* (FFD82-271)	2,300,000.00
8.	*State v. Dun Ler* (FFD82-070)	150,000.00
	TOTAL	6,430,500.00

FOOTNOTES

1. Figures here do not include an $87,000 DOR assessment anda $125,000 criminal fine awarded in a companion Maricopa County Attorney criminal prosecution as a direct consequence of the civil case.

2. $20,000 of this amount is the estimated fair market value of jewelry transferred to th State (appraised value of jewelry is $50,000) and $5,500 is includued as an estimate of fair market value of property forfeited to State.

3. Includes $200,000 promissory note forfeited to State.

4. As to Defendants Greehling, Dun Ler Enterprises & Max Parson, the acutal figures have not yet been determined. Automobile parts and bank accounts have been placed in receivership. An auction was held and these parts were sold for over $100,000. Proceeds of receivership assets will be distributed pursuant to further court order.

5. $12,000 in costs awarded has made one of twelve monthly payments.

6. Includes a $2,000,000 lien filed in the civil action to secure claims against gain acquired from racketeering, and $300,000 lien to secure specific forfeiture of the Tocco residence and the Birdcage night club.

7. Value of captured stolen car parts secured by court injunction, and sold at auction, or returned to victims when identified.

CRIMINAL PROSECUTIONS

A. RICO Charged/Remedies Sought

		RESTITUTION	FINES/COSTS	SENTENCE
1.	State v. Cooper		$33,600.00	
2.	State v. Tison	$ 15,428.00	14,800.00	6 mos Jail 25 yrs Probation
3.	State v. Chudy	1,875,000.00		6 yrs ASP
4.	State v. Lehto	100.00		6 mos Jail 3 yrs Probation
5.	State v. Western Savings			
	Kinchen		1,120.00	2 yrs Probation
	Levin		11,200.00	4 yrs Probation
	Richards		1,120.00	1 yr Probation
	Sherman		11,200.00	4 yrs Probation
	Slade		1,120.00	1 yr Probation
	Zertuche		2,240.00	2 yrs Probation
	TOTAL	$1,890,528.00	$76,400.00	

8. FINES/COSTS ASSESSED

	RESTITUTION	FINES/COSTS	SENTENCE
1. State v. Hagen	$1,224.78	$1,000.00	4 mos Jail 3 yrs Probation
2. State v. Phillips		500.00	2 yrs Probation
3. State v. Kerber		1,000.00	
4. State v. Gillespie	312,643.64	68,500.00	1 yr ASP 5 yrs Probation
5. State v. Sayers		350.00	3 yrs Probation
6. State v. Edelson		1,000.00	3 yrs Probation
7. State v. Davis	3,350.00	500.00	5 yrs Probation
8. State v. Oboryshko		500.00	3 yrs Probation
9. State v. Connell	455.36	3,500.00	4 yrs Probation
10. State v. Galan		1,000.00	2 yrs Probation
11. State v. Grosso		70,000.00	200 hrs WOP 4 yrs Probation
12. State v. Karpinski	3,927.00	1,000.00	3 yrs Probation
13. State v. Karpinski		1,000.00	3 yrs Probation
14. State v. Timberlake		196.00	2 yrs Probation
15. State v. Vickers		1,000.00	50 hrs WOP 3 yrs Probation
16. State v. Palma		1,900.00	
17. State v. Hook		700.00	
18. State v. Evans		1,000.00	
19. State v. Martinez		1,000.00	
20. State v. Torbert	7,266.35	500.00	192 hrs WOP 3 yrs Probation

B. FINES/COSTS ASSESSED (Cont.)

	RESTITUTION	FINES/COSTS	SENTENCE
21. State v. Torbert	1,679.19	2,500.00	
22. State v. Torbert	2,484.17	2,500.00	
23. State v. Miller		500.00	1 yr Probation
24. State v. Mellen		1,000.00	160 hrs WOP 1 yr. Probation
25. State v. Anderson		6,000.00	1 yr Jail 7 yrs Probation
26. State v. Darnell		1,507.00	
27. State v. Wickman		15,000.00	1 yr Jail 384 hrs WOP 7 yrs Probation
28. State v. Moss		400.00	1 yr Probation
29. State Jakubick		1,000.00	2 yrs Probation
30. State v. Misak	4,697.30	1,000.00	3 yrs Probation
31. State v. Shaw		1,000.00	3 yrs Probation
32. State v. Cooper	737.52	7,500.00	3 yrs Probation
33. State v. Bernardo	194.00	150.00	1 yr Probation
34. State v. Bowling		2,240.00	2 yrs Probation
35. State v. Burrow		560.00	
36. State v. Cherry		5,000.00	4 yrs Probation
37. State v. Romo	2,000.00	2,000.00	
38. State v. Andrade	1,100.00	1,120.00	
39. State v. Ramos	800.00	200.00	
40. State v. Nichols	3,360.00		

B. FINES/COSTS ASSESSED (Cont.)

	RESTITUTION	FINES/COSTS	SENTENCE
41. State v. Crowley	1,900.00	1,120.00	
42. State v. DeGroot		1,120.00	2 yrs Probation
43. State v. DiPiero		336.00	3 yrs Probation
44. State v. Dufour	882.00	2,000.00	3 yrs Probation
45. State v. Flores	1,212.00	400.00	3 yrs Probation
46. State v. Gillespie		115,360.00	1 yr Jail 7 yrs Probation
47. State v. Gomez, D.	1,059.54	1,000.00	3 yrs Probation
48. State v. Gomez, P.	1,059.54	1,000.00	3 yrs Probation
49. State v. Hall		1,000.00	
50. State v. Hardin		2,000.00	
51. State v. Hawkins		224.00	3 mos Probation
52. State v. Head		137.00	40 hrs WOP
53. State v. Hester	4,890.00	4,000.00	2 yrs Probation
54. State v. Hector		560.00	2 yrs Probation
55. State v. Helms		100.00	1 yr Probation
56. State v. Hentzner		42,000.00	4 yrs ASP
57. State v. Jordan	740.00	1,000.00	
58. State v. Lustig		8,400.00	5 yrs Probation
59. State v. Martinez	1,297.00	336.00	3 yrs Probation
60. State v. Mendes	100.00	350.00	1 yr Probation
61. State v. Merluzzi		60.00	1 yr Probation

B. FINES/COSTS ASSESSED (Cont.)

		RESTITUTION	FINES/COSTS	SENTENCE
62.	State v. Millstein		2,620.00	1 mo Probation
63.	State v. Ming	14,000.00	6,000.00	60 days Jail 3 yrs Probation
64.	State v. Moore		5,000.00	3 yrs Probation
65.	State v. Orians		22,400.00	5-10 yrs ASP
66.	State v. Reaves		2,498.00	2 yrs Probation
67.	State v. Reuling	455.00	1,000.00	
68.	State v. Robbins		560.00	1 yr Probation
69.	State v. Sayers		480.00	3 yrs Probation
70.	State v. Shelton		5,600.00	3 yrs Probation
71.	State v. Spaulding		2,240.00	2 yrs Probation
72.	State v. Thornton		112.00	1 yr Probation
73.	State v. Torres		1,120.00	3 yrs Probation
74.	State v. Wilsonz	1,950.00	300.00	3 yrs Probation
		$375,466.07	$439,656.00	

III. CIVIL RACKETEERING - CASE SYNOPSIS

1. State v. Jaynes, et al.; C-386554, CIV-GL-3644. Defendants Jaynes and Ledbetter under the business name of Tri-State Paving Company were engaging in practices commonly known as "Williamson Gang" activity. Approaching small businesses and residences in rural communities, the defendants would represent that they had some paving material left over from a previous job which they would sell to the victim at a very good price. Once entering into the paving job, the defendants would asphalt areas larger than initially agreed upon with the victim and then request payment of several thousand dollars more than what the victim had expected to pay. A complaint was filed alleging violations of the State Racketeering Act and the Consumer Fraud Act. The matter was settled through Consent Judgment that consisted of injunctive relief, a $10,000 civil penalty, $2,000 for attorneys fees and $24,750 in restitution for victims.

2. State v. William Lee Bransen, d/b/a Brown, Beaman and Dyer, C-405249, FFD80-004. Bransen, doing business as Brown, Beaman and Dyer, sold custom ordered draperies, mini-blinds, wooden shades and shutters. After accepting orders he failed to deliver the ordered products in at least 153 instances. A complaint was filed against Bransen alleging violations of the Arizona Consumer Fraud Act and the State Racketeering Act. The matter was resolved through a default judgment in which the Court awarded the State $170,000 in civil penalties, $3,825 in attorneys fees and $95,923.69 in restitution.

3. State v. Evans (Intergem I), FFD79-078. This case involves an action brought by our office on behalf of the Corporation Commission to enjoin the sale of investment contracts involving gems. The complaint also utilizes a consumer fraud and racketeering theory involving the fraudulent sale of jewelry.

4. State v.Intergem (Intergem II) FFD79-072. Same as #3.

5. State v. Resort Development, FFD79-077. On September 14, 1979 the Attorney General filed a civil action in the name of the Arizona Corporation Commission, pursuant to the Securities Act of the State of Arizona, and the Anti-Racketeering Act to obtain restitution, damages, civil penalties and injunctive relief. The complaint alleges that the defendants sold unregistered securities, specifically, limited partnerships, for $10,000 apiece for the represented purpose of raising money to purchase the Carefree Inn and that they falsely represented to the persons they sold limited partnerships to that they had an option to purchase the

Carefree Inn. In truth and fact no such option ever existed. The complaint further alleges that the defendants falsely represented that they were successful in other efforts to turn hotels into condominiums for resale similar to the plan they had for the Carefree Inn. The complaint alleges further that the misrepresentations regarding the Carefree Inn and other similar enterprises engaged in by defendants violated the Arizona Consumer Fraud Act and the Anti-Racketeering Act.

6. State v. General Ariozona Clearinghouse Corp. FFD80-064. This case involves an action brought by our office on behalf of the Corporation Commission to prohibit sales of unregistered securities and securities fraud by General Arizona Clearinghouse Corporation and related corporations and individuals. This case involves a Ponzi scheme in which the promoters promised investors a return of 104% per annum for their investments. The promoters allegedly used investors' money to invest in the international precious metals market wheeby the compnay, through the use of "sophisticated computers." made enormous profits in the arbitrage market. We have obtained a preliminary injuction against the company and the other named defendants. The United States Securities and Exchange Commission has also filed a lawsuit against General Arizona Clearinghouse Corporation and some of our defendants and has obtained a receiver. A Motion to Set and Certificate of Readiness was filed.

The Court set a January, 1984 trial date. The assigned Assistant Attorney General commenced to prepare for the trial in this case.

A Motion to Summary Judgment was filed on September 27, 1983 by the State on the securities issues. The Court denied the Stjate's Motion for Summary Judgment. Defendants have agreed to a consent judgment involving findings, an injuction and a money judgment involving about $200,000.

7. State v. Harley T. "Bud" Herrin and Melea A. Herrin, dba Action Line of America, Inc. FFD80-141. This action involved consumer fraud and racketeering allegations of scheme and artifice to defraud in relation to the operation of a consumer mediation/assistance business. Herrin and his wife, through Action Line, offered to sell and sold consumer mediation services, franchises and state directorships from a base located in Phoenix. They misrepresented the amount of the mediation service membership fee, failed to reveal that a percentage of monies recovered would be retained by them, misrepresented the qualifications of staff, availability of services, background of the company, and possible return on an investment in a franchise. The offer to sell and sale of stock

in the company violated requirements of the Arizona Securities Laws and constituted racketeering.

The defendants fled to Georgia, a default judgment was obtained for over one hundred twenty thousand dollars in restitution, costs, attorneys fees, civil penalties and treble damages to victims of racketeering.

An attorney has been retained in Georgia to attempt collec- tion on the judgment.

7. State v. Norman Newman and Larry Schwartz, C-403915, FFD80-030. The defendants, doing business as L & M Distributors, engaged in mail order fraud by sending unsolicited, c.o.d. packages of a dozen pens to filling station owners in the Prescott area in the month of December. The boxes were of a size that it appeared as if they might contain parts regularly ordered by a filling station. A complaint was filed alleging consumer fraud and racketeering. A consent judgment was entered into providing for injunctive relief, civil penalties of $1,500, $500 in attorney fees, treble damages to the victims and $35 in illegal financial gain.

8. State v. The Jewel Box Loan Company, Inc., C-419938, FFD80-207. The Jewel Box, a pawn broker, was charging interest in excess of the legal rate, two percent per month. A complaint was filed against the corporation alleging violations of the Arizona Consumer Fraud Act and the State Racketeering Act. The company entered into a Consent Judgment with the office in which they agreed to charge only the legal limit and agreed to make certain disclosures to consumers with respect to the pawn transaction. The company paid the State $50,000 in civil penalties and $7,554.50 in attorneys fees.

9. State v. Buckner, FFD81-267. This case relies upon predicate crimes of drug and stolen property/fencing predicates and leading organized crime. The action successfully put out of business the Phoenix metropolitan area's massage parlor industry. It resulted in significant discovery that produced a data file of at least 10,000 documents related to the prostitution industry and related criminal activites. This data base has significantly expanded investigative capabilities of police agencies throughout the Valley.

Summary Judgment was obtained against Buckner and his associates in an amount over half a million dollars. Buckner was tried criminally on charges arising from the investigation and is currently serving his sentence in the State Prison.

Consent judgments were entered into with remaining Defendants provding for payment to State of $125,000 in costs plus permanent injunction against prostitution and other act violations.

10. State v. Buckner, FFD81-353 Bawdy house abatement actions filed by the County Attorney, which were pending when #9 was filed. Concluded by permanent injunction against owners and operators at each location plus $26,000 judgment for costs of closing massage parlors.

11. State v. Royal Cambridge Enterprises, Ltd. FFD80-293. Royal Cambridge Enterprises, Ltd. was selling and offering for sale vending machines and metal etching routes wihtin and from the State of Arizona. The complaint alleged the sale of unregistered securities by unregistered dealers and/or salesmen and securities fraud, violations of the RICO statute involving fraud in the purchase or sale of securities, sale of unregistered securities and transactions involving such securities by unregistered salesmen/dealers and acts of racketeering involving a scheme or artifice to defraud. The complaint also alleges that the defendants violated A.R.S. § 13-2312 involving illegal control or conduct of an enterprise through racketeering. Finally, the complaint alleges violations of the Consumer Fraud Act. A.R.S. §§ 44-1622 and 44-1531.

12. State v. Hovic Corporation, et al, FFD81-058. This case involved an action brought on behalf of the Corporation Commission and the Real Estate Department against the Hovic Coporation, its president, vice president and various salespersons for violating the Securities, Real Estate, Consumer Fraud, and the Racketeering Acts. Hovic Corporation is a "boiler-room" type operation which at various times has sold gems and oil and gas lease lottery programs.

13. State v. Zucker, FFD82-020. This is a case brought against a Tucson optometrist who became involved in the cocaine trade at a nightclub he owned called "the Night Train". He also conducted narcotics deals at his home on Waverly Drive. Zucker's club staff distributed cocaine to patrons at the bar. Zucker surrendered his ownership in the bar as well as a $200,000 note, as a settlement of the civil racketeering action. He agreed to pay costs in the amount of $12,000 to the Attorney General's Office.

14. State v. Grosso, FFD80-291. This case involves a scheme to fraudulently obtain finders and referral fees and commissions involving second mortgage financing on the part of Thomas Grosso. The civil racketeering case currently has tied

up close to three million dollars in accounts controlled by the court appointed receiver. The court has granted summary judgment against us on the usury claim.

*The state's consumer fraud and racketeering claims were voluntarily dismissed.

15. State v. Diversified Financial Services, FFD81-408. This is a fraudulent tax shelter scheme. The defendants ran a "creative tax planning service" that sold illegal tax shelters to victims. The shelters have been disallowed by the Internal Revenue Service. It is estimated that the central figure, John Williams, made up to $4.7 million in this scheme.

Judgment has been granted to the State in an amount in excess of $6 million. Williams was subsequently convicted criminally based upon charges developed in the civil case, and is currently serving his sentence in the State Prison.

16. State v. International Silver Limited, FFD80-326. A racketeering action predicated on fraud, dealing in narcotic drugs, trafficking in stolen property, extortion and leading organized crime, this case is based on conduct involving the sale of precious metals throughout the United States.

The State recently received a judgment in an amount of close to $4 million. A partial recovery will soon be distributed to victims from monies recovered.

17. State v. Cara Brock, FFD82-133. This case involves fraudulent tax shelters based on mining operations in Utah and Oregon. The evidence indicates that the defendants have diverted investors' monies to their own use. Investors are located throughout the United States. Projected losses are in the millions of dollars.

All corporate Defendants were defaulted. Motions for summary judgment were filed against Defendants Brock, Christian and Schaer. Settlement negotiations for the remaining Defendants, Russell B. Smith, III are rearing completion.

18. State v. Tocco, FFD82-271. A racketeering action based upon Extortion, Leading Organized Crime and Prostitution predicate offenses. The defendant is a very major target.

Currently Tocco is attempting to withdraw from his plea of guilty to numerous counts in a companion criminal case. Action on the civil case has been postponed pending resolution of these criminal charges. Claims are in an amount in excess of

$2,000,000. The defendant has sought to elaborately disguise his property interests and has executed a series of sham transactions with his wife in an effort to foil execution of any judgment.

19. State v. Dun Ler Enterprises, FFD82-070. Originally brought by Maricopa County, this early racketeering action is directed at the "chop shop" operations of Donald Greehling (Ace Auto) - related to Chicago organized crime interests. This action was referred to the Attorney General's Office by Maricopa County due to our expertise in this area.

Default judgment has been obtained in an amount in excess of $2 million. An auction was held recently of all the auto parts that had not been returned to the victims. That auction netted over $100,000.

Greehling was convicted and sentenced to federal prison for auto theft and weapons charges. He is connected to organized crime associates in Chicago.

20. State v. Samaniego, FFD83-157. Simultaneous civil racketeering action and criminal indictment brought against a southern Arizona drug smuggling and distribution ring that sold narcotic drugs imported from Mexico throughout the United States and western Canada.

This action involves multi-million dollar claims and forfeiture theory related to narcotics. State has settled with defendant Dennis Johnson, obtaining forfeiture of 1/2 of his equity in the property that was the marijuana farm. Settlements with all defendants other than Manny Samaniego are in progress. Manuel Samaniego has now filed a Special Action before the Supreme Court, once again challenging the sufficiency of service of the Summons and Complaint on him in Mexico by a Cochise County Deputy Sheriff. The matter is set for determination without oral argument on January 15, 1985.

21. State v. Challenge, FFD80-236. This lawsuit was brought in September, 1980 against Challenge, Inc., Glenn W. Turner and the officers and directors of Challenge, Inc. The suit alleges that the defendants are engaged in the sale of a motivational sales program involving pyramid and securities violations of the Securities, Consumer Fraud and Racketeering Acts.

22. State v. Alexander, FFD82-320. Racketeering, securities and consumer fraud violations were brought against William S. and Constance J. Alexander, 15 of their corporations and two salespersons for securities related violations. The Alexanders sold investments in greyhound dogs and dairy cattle which were promoted as tax shelters. Over two million was lost by investors.

IV. CRIMINAL RACKETEERING CASE SYNOPSIS

(A) Completed Criminal RICO Action

1. State v. Cooper, CR-110047

The defendant, an owner of a second hand salvage business, was accused of running an illegal fencing enterprise and trafficking in thousands of pounds of copper stolen from the Inspiration Consolidated Copper Company. He plead guilty to conducting an illegal enterprise, was ordered to divest himself of his business and pay a $33,600 fine.

2. State v. Tocco, CR-129027

The defendant, whose brother is reputed to be a notorious member of the Chicago Mafia, was accused of leading organized crime, conducting two illegal prostitution enterprises and one loan sharking enterprise, various conspiracies, the fraud and obstruction of justice. He plead guilty and was sentenced to a total of 20 years at the Arizona State Prison.

3. State v. Tison, CR-10951

The defendant is charged with illegally conducting a chop shop enterprise where he cut up stolen vehicles and used the parts to rebuild salvage vehicles, as well as various counts of theft, trafficking in stolen property, fraud, and VIN switching.

Tison was sentenced to six months in jail, fined $6,850.00. He was also ordered to pay restitution in the amount of $15,428.00 and costs in the amount of $7,950.00.

4. State v. Chudy

Defendant Chudy was charged with embezzlement involving $1,875,000.00. Even though A.R.S. § 13-2312 was not charged, the $1.8 million dollar settlement was obtained by using A.R.S. §§ 13-2313 and 13-2314.

5. State vs. Western Savings, CR122281

Seven title company employees were accused of misrepresenting sale prices and financial information to lending institutions in order to obtain greater financing. The loans on 51 residences listed in the conspiracy totalled approximately $3.5 million.

All defendants pled guilty and were assesed a total of $28,000.00 in fines.

(B) Pending Criminal RICO Actions

1. State v. Stansfield, Stanfield and Dawson,
CR-117509 and CR-118662 (consolidated)

The defendants are accused of defrauding 20 banks of a total of $150,000. Since being charged they have fled the country.

If convicted, in addition to the RICO penalties and fines, they face substantial prison terms.

2. State v. Levin, CR-133638

The defendant, a former Phoenix attorney, is accused of stealing over $10 million dollars. He is charged with conducting an illegal enterprise, 138 counts of fraud, and 20 counts of theft. If convicted, in addition to the RICO penalties, a judge could warehouse him in prison and a fine of $23.9 million dollars.

3. State v. Samaniego, et al., CR-11188

The defendant is accused of running an international drug smuggling and distribution ring. If convicted he faces the possibility of life prison sentence and $3 million in fines.

4. State v. Hall, CR-11834 and
State v. Turlington, CR-11004

Although neither of these cases charged RICO because predicate offenses of fraud were used in the commission of these offenses, pre-conviction RICO remedies have been employed. For example, in Turlington RICO liens in the amount of $600,000 were placed on two of the properties owned by Turlington. As a result of the state's action one of the victims was able to obtain a $1.3 million defraud judgment against the defendant who has fled.

5. State v. Reasoner, etal.
CR-141114

The defendants operated a "chop shop" out of their residence. The operation specialized in late model Ford pickup trucks and consisted of rebuilding vehicles with stolen parts and selling stolen parts through newspaper advertisements. Estimated loss is $50,000.00.

6. State v. Terrell, et al.
CR-11321

The defendants operated and were involved with a "chop shop" at a remote desert location east of Apache Junction. They were charged with Conducting an Illegal Enterprise, Trafficking, VIN destruction, Criminal Damage and Theft.

7. State v. Gustafson, et al.
CR-142909

Defendants are charged with running an illegal enterprise, attempting to receive earnings of a prostitute, receiving the earnings of a prostitute, sale of a narcotic (cocaine) and possession of a narcotic for sale.

Most of these charged offenses involve nondangerous property crimes as opposed to crimes involving violence or serious physical injury. Because of the manner in which the Attorney General charges all the above defendants, the court has the discretion to give any defendant what would amount to a life prison sentence. As a practical manner, in most of the cases a judge will not do that. And while theoretically, if convicted, the above defendants could be fined over thirty million dollars. It is extremely unlikely that will occur unless the defendants have substantial assets or clearly profited from their illegal enterprises.

FLORIDA DEPARTMENT OF LEGAL AFFAIRS

ATTORNEY GENERAL'S OFFICE

RICO Litigation

SINCE 1979

RECOVERIES

DATE	CASE	AMOUNT
1980	Jim Smith v. Fla No-Fault Insurance Agency, Inc., etc., et al.	$125,000
	IN RE: The Forfeiture of 160 Acres of Land Located in Dixie Co., Fla.	54,090
	Robert L. Shevin, etc., et al. v. Michael G. Thevis, etc., et al.	50,000
	1980 TOTAL	$229,090
1981	Russell William Leicht v. Louis Wilson, Criminal Law Enforcement Div. In Miami	$389,943
	1981 TOTAL	$389,943
1982	IN RE: The Forfeiture of U.S. Currency in the amount of $102,850.00, more or less	$101,250
	IN RE: The Forfeiture of Real Property Located in Polk Co., Fla. (Worthington)	231,880
	Forfeiture of a Mitsubishi MU-2B-25K Aircraft, Tail No. N281MA	178,731
	Jim Smith v. Peter Burt	100,000
	Jim Smith v. Philip Keidaish	277,229
	1982 TOTAL	$889,090
1983	State of Fla., Dept, of Legal Affairs v. Stile, Ltd., etc., et al.	$ 50,000
	Jim Smith v. Sunny Isles Motel Corp., George Rhodis and John Rhodis	26,500
	Jim Smith v. Philip Keidaish (Colonial Gardens)	37,850
	Jim Smith v. Richard DeLisi (Manatee Co. Property)	2,420
	Jim Smith v. Charles D. Ivey, ect., et al. (Cash)	172,000

	Jim Smith v. Earl John Stewart, etc., et al. (REMMS Property)	273,693
	IN RE: The Forfeiture of Real Property Located in Section 14, T26S, R15E, Pasco Co., Fla. (No. Tampa Airport)	380,000
	Smith v. Theodore J. DeLisi, et al	900,000*
	1983 TOTAL	$1,842,463
1984	Jim Smith v. Hector L. Barona, etc. et al. ($50,000 mortgage)	$ 51,652
	IN RE: The Forfeiture of Real Property Located in Monroe Co., Fla. (Morra)	140,000
	IN RE: The Forfeiture of Real Property Located in Section 14, T26S, R15E, Pasco Co., Fla. (No. Tampa Airport Rent)	28,800
	IN RE: The Forfeiture of Unit 39, Group J, Sorrento Villas, etc., Collier Co., Fla. (Corrado Property)	15,000
	Jim Smith v. Jerry Cortis Aaron, etc., et al.	90,901
	IN RE: The Forfeiture of 23.75 Acres of Land Located in Alachua Co., Fla. (Giambrone -- Property)	53,500
	IN RE: The Forfeiture of 92 Acres of Land Located in Jefferson Co., Fla. (Zion Coptics)	154,500
	IN RE: The Forfeiture of parcel A and Parcel B Located in Hillsborough Co., Fla. (A. J. Howard -- Springs Theatre)	11,575
	IN RE: The Forfeiture of 50.95 Acres of Land Located in Glades Co., Fla (Bellatrix)	91,628
	Jim Smith v. Philip Keidaish (Colonial Gardens)	27,500
	IN RE: The Forfeiture of Real Property Located in Martin County, Florida	54,328
	Smith v. Kevin J. Madden	262,834
	State of Florida v. Gerald R. Smith	2,635,727
	1984 TOTAL	$3,617,945

* Includes estimated values of real estate pursuant to court judgment, but subject to pending appeal.

1985	Smith v. Theodore J. DeLisi, et al. (Colonial Gardens Pharmacy)	$12,500
	IN RE: The Forfeiture of Real Property Located in Pasco County, Florida	4,800
	Smith v. Timothy J. Madden	25,000
	IN RE: The Forfeiture of Real Property Located in Broward County, Florida	15,000
	Smith v. Douglas W. Grondahl	275,000
	IN RE: The Forfeiture of Real Property Located in Volusia County, Florida	17,134
	Smith v. Gerald R. Smith, et al.	17,136
	1985 TOTALS	$ 366,570
	GRAND TOTAL ----------------------------------	$7,335,101

JUDGMENTS

Philip Keidaish; Partial Final Judgment (10-22-82)	* $2,395,000
Martha Douglas; Final Judgment (2-21-83)	17,000
Roy Brown; Final Judgment (6-15-83)	10,194
William B. Jennings; Final Judgment (2-12-85	179,284
TOTAL	$2,601,478

* Reduced by payments on Colonial Gardens Receivable.

** Judgment in favor of auto theft victims. Court appointed receiver presently marshalling and selling assets with proceeds to be applied to the judgment.

INVESTIGATIONS AND LITIGATION

The Section is currently involved in investigations and litigation involving in excess of $5,000,000 in assets.

NEW MEXICO SPECIAL PROSECUTIONS DIVISION

ATTORNEY GENERAL'S OFFICE

RICO Litigation

SINCE 1982

I. State v. Steele, Bernalillo County Docket No. CR-35129

A. New Mexico RICO prosecution pursuant to 30-42-1 NMSA, et. seq. (1982). Public Authority Fraud

B.

Bruce Charles	Fred Chris Smith
Assistant Attorney General	Director, Special Prosecutions
P.O. Drawer 1508	P.O. Drawer 1508
Santa Fe, NM 87504-1508	Santa Fe, NM 87504-1508

C. E.L. Steele, defendant.

D. The defendant, E.L. Steele, was indicted in Albuquerque, on March 24, 1982 on multiple counts of fraud, securities fraud, criminal solicitation and racketeering. The charges arose out of defendant's use of numerous "straw buyers" to fraudulently qualify for and to obtain low interest mortgage loans from the New Mexico Mortgage Finance Authority. The nominees used by the defendant were in fact not entitled to receive the low interest mortgage loans. The defendant used the fraudulently obtained low interest financing to benefit himself and his companies, J and S Inc., and Sun Country Construction, in connection with his construction and sale of residential property in a relatively depressed real estate market.

The State successfully moved for and obtained an order pursuant to 30-42-4(F) of the State Rico statute, prohibiting the defendant from disposing of any assets obtained through defendant's operation of his companies. A Court-ordered trust was used to collect the proceeds from sales of residential properties by the defendant while the racketeering charges were pending.

Defendant entered a plea of guilty on August 15, 1982, to charges of securities fraud, criminal solicitation and attempted fraud in excess of $20,000. The defendant was placed on supervised probation and ordered to pay restitution of $50,000 to the New Mexico Mortgage Finance Authority. The racketerring charge together with other charges were dismissed as part of the plea agreement.

E. Sun Country Construction Company and J and S Incorporated were alleged to have been the companies operated by Steele, through a pattern of racketeering.

F. Relying on misrepresentations, the New Mexico Mortgage Finance Authority approved dozens of bond-backed loans, with a total value of several million dollars, intended to benefit low to mid-level income borrowers throughout New Mexico, who could not otherwise afford to purchase their own residence. In addition to denying the benefits to those individuals and families who were designed to be the beneficiaries of the program, the pattern of fraud aided the financial speculations of the defendants who took advantage of the program. The pattern of fraud affected the entire State of New Mexico.

G. Other defendants who were convicted of fraud or securities fraud charges included real estate agents, mortgage brokers, promoters, developers and one attorney. In all, eleven defendants were convicted of felonies similar to those pled to by this defendant.

II. State v. Vincent, Lincoln County Docket No. CR-83-38

A. New Mexico Racketeering Prosecution, pursuant to 30-42-1 NMSA et seq. (1983). Time-share Securities Fraud.

B.

Fred Chris Smith
Director, Special Prosecutions
P.O. Drawer 1508
Santa Fe, NM 87504-1508

John G. McKenzie
Former Assistant
Attorney General
P.O. Drawer 1508
Santa Fe, NM
87504-1508

C. Jim Vincent, a/k/a James Vultaggio, Dean Shade and Donald Gardner, defendants. Shade and Gardner were not charged with racketeering.

D. The defendant was indicted on a twenty-two count indictment charging racketeering, fraud and securities fraud, in connection with the sale of time-share memberships in the Ruidoso Condo-Share Vacation Club in Ruidoso, New Mexico.

The defendant and others, through mass mailings which promised free gifts, induced hundreds of people primarily from Texas, to travel to Ruidoso. Through fraudulent representations and high pressure sales tactics the defendant sold time-share interests as investments. Defendant was the developer and general manager of the time-share business. The securities fraud charges were tried on a risk-capital theory, since the condominium units being sold as time-shares were not owned by the defendants at the time of sale.

On December 16, 1983, Vincent was convicted by jury of fraud, securities fraud, sale of unregistered securities, conspiracy and solicitation. He was acquitted of the racketeering count.

E. The racketeering enterprises originally alleged were Ruidoso Condo Share Vacation Club and Sierra Santa Development Company, Ltd.

F. Vincent had previously been tried and acquitted in California on charges of securities fraud in connection with a campground, time-share, sales operation. He has been investigated in several other states for similar time-share operations. Gardner was previously convicted of securities fraud.

G. The defendant was sentenced to 13 1/2 years, part of which was suspended on the condition that he not sell land, time shares or securities; or, be involved in sales of any kind. The case is presently on appeal.

Vincent's two sales managers, Dean Shade and Donald Gardner, were also convicted of multiple felonies in separate jury trials. Gardner was also subsequently convicted as an habitual offender. All convictions are presently on appeal.

III. State v. Taylor, Boyd, Houston, Grissom and Shipley; Curry County Docket No. 85-CR-9489.

A. New Mexico prosecution under Section 30-42-1 NMSA *et seq*. (1983). Savings and Loan Fraud and Securities Fraud.

B.

David W. Bonem	Fred C. Smith
District Attorney	Richard J. Klein
9th Judicial District	Assistant Attorneys General
Curry County Courthouse	State of New Mexico
Clovis, New Mexico 88101	Special Prosecutions
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C. W.W. Taylor, a.k.a. "Doc" Taylor; Glen Houston
Joe T. Boyd, a.k.a. "Doc" Boyd; Hollis Grissom
Randolph Shipley, defendants.

D. The charges in this pending criminal complaint arise from the defendants' alleged takeover in the summer of 1982 of failing State Savings and Loan Association of Clovis ("SS&L"), New Mexico. Thereafter, during a 15 month period prior to receivership, the defendants and their controlled corporations sold $28 million of speculative and overvalued securities to SS&L which SS&L purchased with brokered funds. Losses to FSLIC in the receivership are estimated to be well in excess of $10 million.

E. The defendants are charged with 18 counts of fraud, embezzlement, securities fraud, conspiracy, savings and loan violations and racketeering. The businesses which the complaint alleges used the proceeds of the racketeering activity are Southwest Mortgage Service Corporation, a Texas corporation, and Credit Plan Corporation, a/k/a Credit Plan Corp., of Corpus Christi.

F. Defendants, Taylor and Boyd, both Texas residents, while on bail on the previous indictment in this case, are alleged to have obtained control of a bank in Wartburg, Tennessee. Hollis Grissom is alleged to have assisted in this enterprise.

The timeshare developments whose notes were sold to SS&L are located across the U.S. and North America. The solar panel tax shelter investments and notes were sold to purchasers in several states. Any financially troubled bank or thrift institution anywhere in the U.S. which is still insured or guaranteed by FDIC or FSLIC, is vulnerable to this type of alleged activity.

Prosecutors are aware of other attempts to acquire interests in banks, savings and loans, and other financial institutions in Texas, New Mexico, Tennessee, Ohio, Utah, Missouri and Louisiana. Civil suits against promoters of the solar panel tax shelters and against time-share developers are pending in numerous states. Defendant Houston is a New Mexico lawyer and Shipley is a California lawyer.

G. This criminal complaint was filed on May 2, 1985, in Curry County District Court. The defendants are currently on bond pending a preliminary hearing in Clovis, New Mexico.

Previous charges from this alleged takeover were filed by indictment against all of the defendants except Grissom on November 1, 1983. The earlier indictment was dismissed by the Court without prejudice one month prior to trial in November 1984, for technical reasons. A new judge has not yet been appointed to hear the case.

IV. State v. Rodriquez; Bernalillo County Docket No. CR-38642

A. New Mexico racketeering prosecution under Section 30-42-1 NMSA et seq. (1984). Real estate Securities Fraud.

B. Assistant Attorneys General, Suzanne Tanner and Richard Klein; P.O. Drawer 1508
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C. Ruben Rodriquez, defendant.

D. The indictment of September 3, 1984, alleges that the defendant, Ruben Rodriquez, used a continuous pattern of fraudulent financial representations about his company, Cinco Enterprises, Inc., to induce investors to lend money to Cinco for six months at 18.5% interest together with a 100% bonus on their investment at the end of the six month term. The investment agreement indicated that Cinco would use the funds to purchase land in the Pajarito land grant, located just a few miles from downtown Albuquerque. The investor was promised a mortgage on the purchased land. The defendant raised about $650,000 over a one year period from investors on these terms. Only $175,000 was spent on the purchase of land. No mortgages were given to the investors. A significant portion of the $650,000 was raised at a time when Cinco was in default on the interest, principal and bonus of earlier investors. The funds not used for land were used to pay the old debts of the defendant's prior company, Babco, Inc., and to support the defendant's and Cinco's extravagant "business" expenses and lifestyle.

E. The defendant is charged with fraud, embezzlement, securities fraud, tax evasion and racketeering. The companies which have obtained and used the proceeds of the pattern of racketeering activity as charged in the indictment are Cinco Enterprises, Inc. and Babco, Inc.

F. The defendant has property and business interests in Arizona which were funded in part by investor proceeds.

G. The defendant has already been convicted on tax evasion. A retrial on the fraud, embezzlement, securities fraud and racketeering charges has not been set following a hung jury on April 12, 1985, in Bernalillo County District Court. An habitual offender prosecution will be filed, based on defendant's prior conviction.

V. State v. Deutsch, Bernalillo County Docket No. CR 37738

A. New Mexico Racketeering Prosecution, pursuant to Section 30-42-1 NMSA et seq. (1984). Mortgage brokerage fraud.

B. Fred Chris Smith
Director, Special Prosecutions
John G. McKenzie, former Assistant Attorney General
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C. Frank Deutsch, defendant.

D. The defendant was indicted on racketeering and other charges in Albuquerque, on February 14, 1984, for fraudulently taking investors' funds from trust accounts and obtaining checks from borrowers in connection with his operation of Continental Mortgage Exchange, Inc., and Guaranteed Equities, Inc., doing business as mortgage brokerage companies. Deutsch had previously been convicted of conspiracy to commit fraud in excess of $20,000. In addition, Contintental

Mortgage had entered a plea to second degree fraud, involving approximately $1.3 million.

While the case was pending trial, the Financial Institutions Division was appointed as receiver of the assets of Guaranteed Equities, Inc. The evidence at trial demonstrated that the defendant took a number of checks totalling over $200,000, from borrowers paying off their loans from Continental and Guaranteed, and simultaneously released the investors deeds of trust, removing their collateral. The checks were traced to a truck stop in Jersey City, New Jersey, where they were cashed for agents of the defendant. During the court-imposed trust and receivership a $160,000 judgment was obtained against the defendant and collected.

E. The business which was alleged to have been operated as a racketeering enterprise was Guaranteed Equities, Inc., which is presently in bankruptcy. Its former owner, John Ross, and its former president, Lester Goldman, were also prosecuted and convicted of felonies. Ross was convicted by jury in December, 1984, of thirteen felonies and is currently serving a sixteen year prison sentence.

F. The case involved transactions in New York and New Jersey as well as New Mexico.

G. The defendant is appealing his convictions and a prison sentence of nine years to run consecutively with a three year sentence for his previous conviction.

The defendant was charged with racketeering, fraud, embezzlement, larceny and forgery. On the day of trial, the racketeering count was dismissed by the State because of the unavailability of a key witness. He was convicted on December 18, 1984, by an Albuquerque jury of fifteen felonies including, four counts of larceny, eight counts of forgery, two counts of embezzlement and one count of fraud in excess of $20,000.

VI. State v. Johnson, Lea County Docket No. #CR-84-415

A. New Mexico racketeering prosecution under Section 30-42-1 NMSA et seq. (1984) Insurance fraud.

B. Paquin M. Terrazas and John Paternoster
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, NM 87504-1508

C. Richard Johnson, Thelma Johnson and Elaine Hulan, defendants. Only Richard Johnson is charged with racketeering.

D. The racketeering and fraud charges in this Hobbs criminal indictment arise from the defendants' alleged submission of fraudulent insurance claims to their insurance company and pledging as security for bank loans, cars represented to be operational, that were either salvage or non-existent in connection with their operation of Johnson Motors.

The alleged racketeering involving insurance fraud consisted of adding items to estimates for repairs that were unnecessary; or, receiving payment for repairs that were never actually done.

If the car had been in an accident, defendants allegedly submitted an estimate containing false claims for frame damage or other items that could not be seen unless the car was closely examined. If a car was repossessed, and Johnson Motors was responsible for payment, the defendants altered the car to appear damaged or totalled.

The defendants used an adjuster who was willing to accept their estimates without performing a complete inspection of the car.

E. Johnson Motors, an automobile dealership and body shop, is the enterprise.

F. The alleged insurance fraud concerned insurance underwriters in both Texas and New Mexico. The loan fraud involved two banks located in Hobbs. Vehicles were moved across state lines and into and out of Mexico.

G. Trial of Richard and Thelma Johnson is underway in Lovington, New Mexico. The defendants Richard Johnson and Thelma Johnson have been named in a second indictment on charges of removing encumbered property, also arising out of their operation of Johnson Motors. No trial date has been set in that separate case, or in the case of State v. Elaine Hulan, who was severed from her co-defendants.

VII. State v. Apodaca, Santa Fe County Docket No. 85-89

A. New Mexico Racketeering Prosecution under Section 30-42-1 NMSA *et seq*. (1985). Highway construction fraud.

B. Fred Chris Smith
Director, Special Prosecutions
Daniel Pearlman
Director, Anti-Trust Enforcement
P.O. Drawer 1508
Santa Fe, NM 87504-1508

C. Harry Apodaca, John Hughes, J-H Supply Co., Coyote Supply Co., Marvin Broce, Melvin Morris, Broce Construction Co., John Way, Dirk Holtman, Cimarron Supply Co., Gates Construction Co., KNC, Inc., Abeyta Construction Co., Moore and Cowart Contractors, Inter-West Ltd., and C. Wayne Frasier, defendants.

Only Apodaca and Hughes were indicted for racketeering.

D. On April 11, 1985, Harry Apodaca and John Hughes were indicted on charges of racketeering. Also charged were J-H Supply co., and Coyote Supply Co., alleged to have been owned and operated by Hughes and Apodaca. Eight additional highway construction firms and five additional individuals were charged with fraud in excess of $20,000. The charges involve alleged efforts to circumvent state and federal programs which required the participation of businesses owned and operated by minorities and women.

It is alleged that the defendants fraudulently represented that qualified and certified minority business enterprises or women's business enterprises did subcontract work to meet the goals of the project, while in fact the work was done by other, non-minority or non-women's businesses.

Since 1980, the New Mexico State Highway Department, pursuant to federal law, has administered the programs, seeking to assist disadvantaged minority and women's business enterprises. The State Highway Department certifies eligible firms as disadvantaged minority or women's business enterprises and sets percentage goals for the participation of these businesses in federally assisted highway construction projects.

The indictment alleges that fraud was involved in connection with approximately $1.3 million of subcontracts representing the participation goals contained in over $58 million of prime contracts made in reliance on the alleged misrepresentations.

E. The enterprise whose affairs were allegedly conducted by both Apodaca and Hughes was J-H Supply Co. In a separate racketeering count, Apodaca is charged with conducting the affairs of Coyote Supply Company through a pattern of racketeering.

F. Bidding on New Mexico Highway Department construction projects is open to prime contractors and subcontractors from throughout the country. Therefore the number of states affected by the alleged fraudulent practices includes all states whose highway construction firms customarily bid on New Mexico projects.

G. Pre-trial motions are set to be heard in August, 1985. Cook Construction Company has already pled guilty to conspiracy to commit fraud in excess of $20,000. The company was named as a women's business enterprise involved in several of the fraud charges against other individual and corporate defendants. The owners and employees of the convicted company are expected to testify against other defendants.

VIII. State v. Balko, Dona Ana County Docket No. CR-85-96

A. New Mexico Racketeering Prosecution, pursuant to 30-42-1 NMSA, et seq. (1985). Odometer and automobile title fraud.

B. Fred Chris Smith
Director of Special Prosecutions
P.O. Drawer 1508

Paquin M. Terrazas
Assistant Attorney General

Santa Fe, NM 87504-1508 P.O. Drawer 1508
Santa Fe, NM 87504

C. Rod Balko, Laverne Balko, Justin Yarbrough and Kelly Yarbrough, defendants. Only Rod Balko was charged with racketeering.

D. On May 2, 1985, the defendant Rod Balko was convicted of racketeering and fraud in connection with his operation of two Las Cruces used car dealerships, in which he and his co-defendants, who were also convicted of fraud and criminal conspiracy, sold used cars whose odometers had been altered and whose titles were false.

The pattern of racketeering included the "washing" of hundreds of titles for other used car dealers from states other than New Mexico. These out-of-state car dealers, for a fee of $100 per title, would send the defendants a title from their own state or from some other state on a car which they wished to sell. Balko or his co-defendants would alter the title papers including the odometer readings on the paper work and apply for a new, New Mexico title, by falsely representing that Las Cruces Auto Sales had purchased the car and intended to sell the car in New Mexico. One of the New Mexico Motor Vehicle employees responsible for accepting these false applications has been convicted of altering documents.

It is believed that over several months, this operation allowed corrupt used car dealers throughout the Southwest to take advantage of the New Mexico Motor Vehicle Department's system which allowed new titles to be issued for out-of-state titles on cars which were never inspected and in most cases, were never in New Mexico.

The dealers were then able to take the "clean" New Mexico titles and obtain new titles in their own states or in other states where the cars were to be sold. These cars would frequently have their odometers rolled back thousands of miles to increase their value before being sold to purchasers for inflated prices.

E. The racketeering enterprises charged were Las Cruces Auto Sales and Frontier Leasing and Sales of Las Cruces.

F. A multi-state task force comprised of local, state and federal law enforcement agencies has been formed to continue the investigation in Texas, Arizona, California, Hawaii and New Mexico. Additional racketeering charges are expected in some of those states as well as in New Mexico.

G. All four defendants are being used as witnesses in other prosecutions. They are all awaiting sentence on their convictions.

IX. State v. Holland, Santa Fe County Docket No. SF 85-176 CR

A. New Mexico RICO prosecution pursuant to 30-42-1 NMSA, et seq. (1985) Trafficking in Controlled Substances.

B. Marcia White and John Paternoster
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6081

C. Joyce Holland a/k/a Mahabba; Wayne Anthony Unsworth a/k/a Batka, a/k/a Baska; Jane Ann Robertson a/k/a Jane Anne Friedman, a/k/a Ma Bodhi Taru, a/k/a Taru; Jeremy Kyle and Nina Simons. Only Holland, Unsworth and Robertson were charged with racketeering.

D. Defendants Holland, Unsworth and Robertson were indicted on July 8, 1985, on charges of trafficking in cocaine, criminal conspiracy, solicitation and racketeering. The indictment alleges that these defendants and others comprised an association in fact, or enterprise, established in order to smuggle cocaine into the United States form as far away as Brazil. Proceeds from the enterprise were distributed to Brazil by international banking and wire transfer facilities.

E. The enterprise is an international association in fact.

F. The charges arose out of a wire-tap investigation conducted by the Attorney General's Office and State and Federal agencies. Unsworth, Robertson and Kyle are British citizens.

Investigations continue in the states of New Mexico, Arizona, Texas, Colorado, California, Oregon as well as Mexico, Canada, Great Britain and Brazil.

G. No trial date has been set. Cash bond of $500,000 has been set for defendant Unsworth. He and defendants Robertson and Kyle remain in custody. Additional criminal charges are expected to result from the ongoing investigation.

OREGON DEPARTMENT OF JUSTICE

RICO Litigation

SINCE 1981

1. **TITLE:** State of Oregon v. Larry R. Kristich

CITATION: Marion County Circuit Court No. 132243

NATURE OF LITIGATION: A civil proceeding alleging that an illicit gambling enterprise was operating an illegal gambling casino, as well as investing the illicit proceeds in a legitimate home repair referal business.

SANCTIONS IMPOSED: The defendant forfeited cash and all known personal property utilized in the illegal gambling casino and the legitimate home repair referral business since all the personal property owned by the legitimate business had been purchased with illicit funds. The defendant was subjected to permanent injunction and executed a $100,000 promissory note due and payable to the State of Oregon upon his conviction of any future Oregon gambling offense. The forfeited cash from various bank accounts, including one in Switzerland, and the liquidated value of forfeited personal property totaled $127,596.04.

EVALUATION: This was Oregon's first RICO case and resulted in record breaking forfeitures. Upon completion of the civil proceeding the defendant left the State of Oregon and has not returned. No criminal cases were pursued. All participating law enforcement agencies recouped their costs and $89,043.24 reverted to the state's general fund. Kristich was a professional gambler who had relocated in Oregon. He had operated illegal gambling enterprises openly in four counties. He had been repeatedly and unsuccessfully pursued by law enforcement authorities using conventional methods.

2. **TITLE:** State of Oregon v. The Church of the Conceptual Truth, et al.

CITATION: Multnomah County Circuit Court No. A8303-01468

NATURE OF LITIGATION: A civil proceeding against The Church of the Conceptual Truth and a number of individuals who organized and operated the church. The suit alleged that an illicit gambling enterprise was operating a large scale bingo operation under the guise of a religious organization.

SANCTIONS IMPOSED: Defendants forfeited all moneys and property that could be determined were "used in the course of" or "proceeds of" the illegal gambling activity. This resulted in a net forfeiture to the State of Oregon of $269,766.46. Defendants' activities were also subject to a permanent injunction.

EVALUATION: The defendants were professional gamblers from the state of Nevada, with backers in the state of California. The operation had been the subject of an unsuccessful conventional criminal proceeding more than a year before the RICO action. In conjunction with the RICO investigation and proceeding, the principals in the organization were again indicted on conventional criminal charges by the local district attorney. These cases resulted in convictions.

3. TITLE: State v. Allen Maxwell Much, et al.

CITATION: Yamhill County Circuit Court No. 83-0873

NATURE OF LITIGATION: A civil proceeding alleging that an illicit narcotics enterprise was growing and distributing various controlled substances.

SANCTIONS IMPOSED: The defendants were subjected to a civil fine of $250,000 and the forfeiture of 43 acres of real property valued at approximately $150,000. Permanent injunctions were also obtained. Partial payment of the civil fine was obtained in the amount of $86,556.82 by execution on several vehicles, a 35' French-made yacht and miscellaneous personal property of the defendants.

EVALUATION: The defendants were also the subject of conventional criminal charges pursued by the local district attorney. Both defendants jumped bail and remain fugitives to this day. The civil RICO sanctions were obtained by default. The case serves as an example of the additional options available because of civil RICO when the principals in a criminal enterprise abscond.

4. TITLE: State v. William S. MacDonald

CITATION: Multnomah County Circuit Court No. A8401-00625

NATURE OF LITIGATION: Civil proceeding alleging that an illicit narcotics enterprise was operating a cocaine distribution network.

SANCTIONS IMPOSED: Defendant was subjected to fines and forfeitures totaling $451,565, as well as a permanent injunction.

EVALUATION: The defendant's narcotics distribution network was the subject of a timely raid, at which time $451,565 was seized along with 10 pounds of nearly pure cocaine. The defendant also faced conventional criminal charges arising out of the incident.

5. TITLE: State of Oregon v. James L. Cannon, et al.

CITATION: Marion County Circuit Court No. 150197

NATURE OF LITIGATION: A civil proceeding alleging that an illicit gambling enterprise was supplying dozens of taverns and bars with video gambling machines while entering into various agreements to split the profits from the illegal gambling on the machines and to evade state and local income taxes.

SANCTIONS IMPOSED: The defendant was subjected to a permanent injunction and a civil fine of $250,000. The video gambling machines involved reverted to financing institutions for sale to satisfy liens. The state obtained an interest in related real property as collateral upon which to execute if civil fine was not paid.

EVALUATION: Approximately two dozen additional civil proceedings were filed against bar and tavern owners involved in the gambling operation. Permanent injunctions and civil fines of approximately $1,500 were obtained against each of these involved businesses. Two similar RICO proceedings were filed against additional video gambling machine distributors. In those proceedings, civil fines of $33,000 and approximately $35,000 and permanent injunctions were obtained. These additional defendants were associated with different enterprises involved in illegal video gambling. However, these other enterprises were not evading state and local taxes.

EVALUATION: The state of Oregon continues to be confronted with organized gambling enterprises utilizing video gambling machines. Conventional criminal efforts to combat this activity have met with limited success.

6. TITLE: State of Oregon v. White and Prather; State of Oregon v. Lyon

CITATION: Jackson County Circuit Court Nos. 84-0119-J-3 (White & Prather) and 84-0118-J-1 (Lyon)

NATURE OF LITIGATION: Civil proceedings alleging that illicit narcotics enterprises were engaged in the commercial cultivation of marijuana.

SANCTIONS IMPOSED: Permanent injunctions against the defendants and the forfeiture of real property utilized in the marijuana cultivation operations.

EVALUATION: Oregon faces significant problems from commercial marijuana cultivators. The state rates third in the nation in producing high grade sinsemilla. Numerous conventional criminal proceedings have had very limited success combatting the problem. Some statistics suggest that marijuana is Oregon's largest cash crop. The civil forfeiture provisions of the RICO Act have proven to be one of the few effective tools available to law enforcement.

7. TITLE: State v. Coast Credit, et al.

CITATION: Multnomah County Circuit Court Case No. A-8502-0999

NATURE OF LITIGATION: A civil proceeding alleging that an association of individuals organized various collection agencies. The complaint further alleges that through the collection agencies the individuals engaged in a pattern of racketeering activity in that they extorted money from various debtors.

SANCTIONS IMPOSED: The court has imposed a preliminary injunction completely closing down one of the corporations and prohibiting two of the named individuals from any collection practices during the pendency of the proceedings. The other named individual has agreed to a preliminary injunction which allows him to continue to collect on various debts assigned to him for collection but on very restricted terms.

EVALUATION: The case is not final. The preliminary relief, however, shows that the statute can be used to obtain immediate results. The time lag between the filing of the complaint and the court's final order was a little more than two months. The RICO statute also allowed our office to present to the court the continued pattern of unlawful conduct and gave the court the authority to impose appropriate temporary remedies.

8. TITLE: State of Oregon v. Waldenbergs

CITATION: Multnomah County Circuit Court Case No. A8506-03582

NATURE OF LITIGATION: The initial complaint alleged unlawful trade practices violation but to the investigation was conducted with an eye towards filing civil racke teering charges. The unlawful trade practice and racketeering counts involved the rollback of more than 40 vehicles.

SANCTIONS IMPOSED: The defendants have agreed to a judgment order under the RICO statute which would impose a fine of $150,000, assign 16 cars having a value of over $80,000 to the Department of Justice for satisfaction of the claims and provide injunctive provisions regarding the defendants' future activities. Moreover, pursuant to the RICO act, from the proceeds our office will make provisions for innocent third parties, i.e. victims.

EVALUATION: Oregon was one of the few states in the nation which did not require the mileage be placed upon the registration. Oregon therefore became a haven for laundering titles. The racketeering statute gave us authority to find the automobiles that the defendant was using in his unlawful enterprise and confiscate them to be forfeited to the state. As of this writing, the judgment order has not been signed by the court; however, the defendant has signed the order and it should be presented to the court the week of July 8, 1985.

9. TITLE: State v. Activator Supply Co., et al.

CITATION: Multnomah County Circuit Court No. A8506-3476

NATURE OF LITIGATION: A civil proceeding brought under the RICO statute alleging unlawful sale of registered securities and misrepresentation of facts surrounding the sale of the unlawful securities.

SANCTIONS IMPOSED: Permanent injunction against the defendants from selling activator kits within the state of Oregon. The activator kits were a part of a multi-level sales scheme which included, according to our allegations, a ponzi scheme.

EVALUATION: The racketeering statute is a useful tool in this type of operation in that it allows us to show the continued pattern of racketeering activity as well as give creative remedies including the ability to trace assets. No assets were recovered in this particular case because it was a multi-state operation and we were unable to locate funds within our state.

10. TITLE: State of Oregon v. David Alvin Hunt and First Colonial et al.

CITATION: Washington County Circuit Court Case No. 85-0757-C

NATURE OF LITIGATION: This is a civil proceeding brought under the RICO statute alleging an unlawful sale of unregistered securities.

SANCTIONS IMPOSED: Our office has obtained a temporary restraining order at this date and a show cause hearing is scheduled for July 19, 1985.

EVALUATION: The primary relief that will be recovered from this particular case will be injunctions against individuals who sold the unregistered securities and made fraudulent representations to various investors throughout the state. As in the Activator case, we would hope in the future to be able to trace assets so as to tie up the assets during the proceedings and eventually protect the consumers in the state from losses resulting from similar frauds.

Mr. NEELY. Mr. Chairman and members of the committee, you will be happy to hear that I have but little to add to the resolutions and written presentation of the National Association of Attorneys General and the National District Attorneys Association.

I would certainly urge the committee to review those written presentations carefully, because they offer as airtight a case as I have seen in about 16 years as a local prosecutor.

I am here to represent the National District Attorneys Association today and to state our position briefly, we oppose any attempts to water down the civil RICO remedies. Certainly, we would support sanctions as have been suggested by the representatives of the National Association of Attorneys General and by Professor Blakey, against those who file frivolous litigation. But more important, I think, is the basis for our position, and the basis for our position is that RICO was and is well-founded legislation. RICO defines and punishes acts, not defendants, and the acts are no less reprehensible merely because they are being committed today by a different class of defendant than might have been anticipated. Although we do not concede that that is the case.

One area that has not been treated extensively in the written materials relates to the limited resources available to local prosecutors as well as U.S. attorneys. My own office has 40 prosecutors, and is larger than the U.S. attorneys office in Arizona. As Mr. Twist has mentioned, we have State RICO statutes modeled after the Federal laws. My deputies handle in excess of 3,000 felony cases and 10,000 misdemeanors a year. The U.S. attorney appears to be similarly burdened. Consequently, RICO actions undertaken by us in State or Federal court must be carefully selected. Neither office can afford to have many prosecutors engaged in time-consuming litigation against well-heeled defendants at any given time.

Cases with governmental victims, virtually indisputable evidence, and involving large sums, will most likely be pursued. Prosecution of the others will often be dependent upon the availability of resources and simply may not occur.

As a result, for the civilian, that is, nongovernmental victim of RICO violations and for society, private litigation may be the only recourse. For the perpetrator, it may be the only sanction.

I invite you to consider the possibility that the inadequacy of our criminal justice system may be the most compelling justification for strong, readily available civil RICO remedies.

I ask today on behalf of the National District Attorneys Association that this committee reject the suggestion that the burden of proof in civil RICO cases be increased and reject the suggestion that criminal conviction precede the civil action. The probability of effective and consistent criminal prosecution is not sufficient to justify placing those additional burdens on victims of racketeering.

Let me address just briefly the contention that organized criminal syndicates, not corporations, are the only proper targets for RICO sanctions. At the risk of being accused of prosecutorial cynicism, I point out that anyone can form a corporation, and that corporations outnumber known criminal syndicates by hundreds of thousands. It is certainly fair to argue that criminal syndicates are more inclined to criminal behavior. However, given the disparity in numbers between corporations and crime syndicates, it is not only unfair, but absurd, to argue that people and governments are less likely to be defrauded by corporations than by criminal syndicates.

You may also have noticed that when the Government commences a criminal action against organized crime syndicates the defendants are usually people. When the Government, on the other hand, commences a criminal action against corporate wrongdoing the people often disappear magically and only the corporation is left as a defendant. Corporations do not go to prison. It is difficult to contemplate conditions under which the temptation toward corporate racketeering could be greater unless, of course, the Congress could be persuaded also to exempt the corporation itself from civil liability and RICO penalties.

I am not here to condemn corporations or ask you to do that. Honest corporations are the backbone of American industry. I do request that you pay heed to the proliferation of $50 nuts and bolts, money-laundering, multimillion-dollar account kiting, odometer rollbacks, insurance fraud, and other ongoing conspiratorial niceties of the corporate underworld. We may legitimately conclude that the deterrent power of civil RICO has not yet been realized.

In the face of such conduct, however, it is laughable to suggest that civil RICO has been proved to be oppressive. Lawyers from the American Bar Association's corporate section suggest that the public should continue to be exposed to corporate racketeering and yet be denied recourse to existing civil RICO remedies because "those other lawyers" may file frivolous lawsuits. The Nation's district attorneys acknowledge that there are unprincipled lawyers who file frivolous lawsuits in virtually every area of the law. The legal profession, not the Congress, needs to take the most strident action to deal with that problem.

In this context, let me add that the suggestion that has been made earlier here today, that the punishment be inflicted directly upon those idividuals who are responsible for frivolous litigation, is the best remedy, not the alteration of the civil RICO remedies themselves

Mr. Chairman and members of the committee, the real tragedy here is not the overabundance of civil RICO litigation, but the fact that this powerful victims' remedy apparently has been utilized only 500 times in the past 5 years. Five hundred times is not a proliferation of litigation, particularly in our Federal court system. My own office, small as it is, will handle between 60 and 100 times that much litigation this year. I suggest that the assertion that has been made here today several times, that we are seeing this proliferation of litigation and that it is the primary indicator of some need for reform, is not correct. In fact, this litigation is underused, not overused.

Thank you.

Senator HATCH. Thank you, Mr. Neely.

[The statement follows:]

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STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
JAMES M HOWARD
CHIEF DEPUTY

STATEMENT BY: STEPHEN D. NEELY, COUNTY ATTORNEY
PIMA COUNTY (TUCSON), ARIZONA
CHAIRMAN, AD HOC COMMITTEE ON CIVIL RICO
NATIONAL DISTRICT ATTORNEYS ASSOCIATION

BEFORE THE SENATE JUDICIARY COMMITTEE
JULY 31, 1985

SUBJECT: CIVIL RICO

Mr. Chairman and Members of the Committee:

I have but a little to add to the resolutions and written presentations of the National Associations of Attorneys General and the National District Attorneys Association. I believe those presentations offer as airtight a case as I have seen in sixteen years as a local prosecutor.

One area that has not been treated extensively in the written materials relates to the limited resources available to local prosecutors as well as United States Attorneys. My own office has forty prosecutors and is larger than the U. S. Attorney's Office in Arizona. We have state RICO statutes modeled after the federal laws. My deputies handle in excess of 3,000 felony cases and 10,000 misdemeanors a year. The U. S. Attorney appears to be similarly burdened. Consequently, RICO actions undertaken by us in state or federal court must be carefully selected. Neither office can afford to have many prosecutors engaged in time-consuming litigation against well-heeled defendants at any given time.

Cases with governmental victims, indisputable evidence, and involving large sums will most likely be pursued. Prosecution of others will often be dependent upon the availability of resources and simply may not occur. As a result, for the civilian - that is, nongovernmental - victims of RICO violations, and for society, private litigation may be the only recourse. For the perpetrator it may be the only sanction. I invite you, therefore, to consider the possibility that the inadequacy of our criminal justice systems may be the most compelling justification for strong, readily available civil RICO rememdies.

I ask today, on behalf of the National District Attorneys Association, that this Committee reject the suggestion that the burden of proof in civil RICO cases be increased and the suggestion that criminal conviction precede the civil action. The probability of effective and consistent criminal prosecution is not sufficient to justify placing those burdens on victims of racketeering.

STATEMENT BY STEPHEN D. NEELY (Continued)

Let me address briefly the contention that organized criminal syndicates, not corporations, are the proper targets for RICO sanctions. At the risk of being accused of prosecutorial cynicism, I point out that anyone can form a corporation and that corporations outnumber known criminal syndicates by hundreds of thousands. It is fair to argue that such syndicates are more inclined to criminal behavior. Given the disparity in numbers, between corporations and crime syndicates, however, it is not only unfair, but absurd, to argue that people and governments are less likely to be defrauded by corporations.

You may also have noticed that when the government commences a criminal action against an organized crime syndicate the defendants are usually people. On the other hand, when the government commences a criminal action against corporate wrongdoing, often the people disappear magically and only the corporation is left as defendant. Corporations don't go to prison. It is difficult to contemplate conditions under which the temptation toward corporate racketeering could be greater unless, of course, the Congress could be persuaded also to exempt the corporation itself from civil liability and RICO penalties.

I am not here to condemn corporations or to ask you to do so. Honest corporations are the backbone of America. I do request that you pay heed to the proliferation of fifty dollar nuts and bolts, money laundering, multimillion dollar account-kiting, odometer rollbacks, insurance fraud and other ongoing, conspiratorial niceties of the corporate underworld. We may legitimately conclude that the deterrent power of civil RICO has not yet been realized. In the face of such conduct, however, it is laughable to suggest that civil RICO has been proved to be oppressive.

Lawyers from the American Bar Association's Corporate Section suggest that the public should continue to be exposed to corporate racketeering, and yet be denied recourse to existing civil RICO remedies, because "those other lawyers" may file frivolous lawsuits. The nation's district attorneys acknowledge that there are unprincipled lawyers who file frivolous lawsuits in virtually every area of the law. The legal profession, not the Congress, needs to take strident action to deal with that problem.

Mr. Chairman, members of the Committee, the real tragedy here is not the overabundance of civil RICO litigation, but the fact that this powerful victims' remedy apparently has been utilized only five hundred times in the past five years.

Thank you.

Senator HATCH. Mr. Feigin?

Mr. FEIGIN. Thank you, Mr. Chairman. My name is Philip A. Feigin. I am the assistant securities commissioner for the Colorado Division of Securities, here today representing the North American Securities Administrators Association, an organization composed of the securities agencies of the 50 States, the District of Columbia, the Canadian provinces, Mexico and Puerto Rico. Much like a National League pitcher, batting last in the lineup, I will attempt to take my three swings and sit down.

The State securities agencies are basically the "street cops" of white-collar crime. We are the ones who receive the complaints regarding everything from $500 worm farms to $50,000 abusive tax shelters. In that context, I think it is important that our views be heard and understood.

In much of the literature and in testimony that we have heard, on the subject of private civil RICO, we have heard talk of Legitimate Enterprise with a capital "L" versus "Organized crime," with a capital "O" as if these are the only two alternatives. Instead, because it is the nature of white-collar crime, white-collar criminals use guile and not guns, and trust and not terror, and invade legitimate enterprise using that trust to take advantage, to reap their profits, to victimize.

So the distinctions are a lot more difficult to draw. As many abuses as we have heard cited, I think we can also cite abuses of the public trust. In the 2 weeks that I have been preparing the written testimony for this hearing, I have read the newspaper and seen articles regarding the Bank of Boston convicted of laundering money. We have seen articles about E.F. Hutton, as higher and higher in the hierarchy of E.F. Hutton evidence of 2,000 felonies being plotted and condoned is reported. And now, a major law firm is being assailed as being partly responsible for the J. David Dominelli fraud.

White-collar crime is responsible for losses of approximately $40 billion a year, at least, based on one estimate made by a Senate committee investigator. Somehow, we need to find a way to change the public perception of white-collar crime. Perhaps because of our trust in these individuals, we find it difficult to consider them to be criminals. This is reflected not only in public perception, but also in our difficulty in convincing prosecutors to commence actions against these persons, in obtaining convictions and then arguing far meaningful sentences.

To talk to some specific points, first of all, we have heard much about the racketeering problem, the stigma attached to being called a racketeer. Justice White, in his opinion in Sedima, asked if that was any worse than being called a defrauder. Apparently, somehow, it is unacceptable to be called a racketeer, but all right to be called a defrauder. In many of the cases that I have dealt with, if securities fraud is alleged, defendants seek to plea bargain to reduce the charges to securities registration violations. If only registration violations are alleged, then they want to settle the matter by injunctive means as opposed to going criminal. It is always something less.

We have heard of the prosecutorial gap. In our view, it is not a gap; it is more like a canyon. As white-collar crime has increased, Federal and State budgets have either remained the same or actually decreased. In fact, the Securities and Exchange Commission and the Commodity Futures Trading Commission are both facing either budget freezes or budget cuts at this point, which will severely impact on their enforcement programs. The same is true at the State level. Meanwhile, white-collar crime has increased at an astounding rate, so the result is quite predictable. The Government and the prosecutors must concentrate on ever more egregious crimes and problems, leaving a broader base of cases either unprosecuted and uninvestigated, or left to private litigants to pursue.

It is our hope that the deterrent value of private civil RICO is yet to be seen, and I think it will become more and more utilized as time goes on.

The euphemisms of "garden variety fraud," "technical violations," and so on, are heard by virtually every prosecutor and every person involved in white-collar crime and securities enforcement. I think these are used to cloak what must be considered wholly unacceptable and criminal conduct. It has entered the mainstream of commerce, and we must do something to stop it, RICO is a very effective way to do it, and the various changes that have been recommended should be rejected.

Thank you.

Senator HATCH. Thank you, Mr. Feigin.

[The statement follows:]

STATEMENT

OF

PHILIP A. FEIGIN
ASSISTANT SECURITIES COMMISSIONER
COLORADO DIVISION OF SECURITIES

AND

CHAIRMAN, SPECIAL PROJECTS COMMITTEE
ENFORCEMENT SECTION
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

I am pleased to have the opportunity to appear before you today as a representative of the North American Securities Administrators Association, Inc. ("NASAA"). I am the Assistant Securities Commissioner for the Colorado Division of Securities and have been directly involved in the enforcement of blue sky laws for over six years. I chair the NASAA Enforcement Section Special Projects Committee and serve as a member of the NASAA Commodities Committee. I have acted as NASAA's enforcement liaison to the Commodity Futures Trading Commission and the National Futures Association. I have been involved in the development and direction of numerous multi-state cooperative enforcement programs. I was a draftsman of the NASAA Model State Commodity Code and have advised the NASAA committee involved in the revision of the Uniform Securities Act. I have appeared on numerous panels at national, state and local seminars on blue sky issues in general and securities and commodities-theme frauds in particular. I also serve as a member of the American Bar Association Section of Corporation, Banking and Business Law, Subcommittee on State Securities Regulation, Enforcement Committee.

You have invited a representative of NASAA here today to provide the state securities administrator perspectives on the controversial subject of private civil RICO actions. While it must be understood that my comments today cannot be taken as those of every NASAA member jurisdiction, I believe my experience at both the local and national levels provides me with broadly based perspectives representative of NASAA as a whole. In addition, on July 20, 1985, in anticipation of this hearing, the NASAA Board of Directors adopted the following resolution:

> Be it resolved that the Board of Directors of the North American Securities Administrators, Inc. ("NASAA") fully supports the concept of private rights of action under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") involving securities, mail and wire fraud, and therefore strongly supports both retention of federal securities, mail and wire fraud violations as predicate offenses, and retention of treble damages for private civil actions under RICO. The Board of Directors is aware that claims of abuse of private civil RICO in the securities, mail and wire fraud area have been voiced. NASAA supports Congressional examination of these claims, inquiry into areas of potential abuse, and consideration of limited statutory modifications to RICO to reduce the potential for such abuses if indeed they exist.
>
> However, it is paramount that the essential concept of private civil RICO remedies as now in place in the context of securities, mail and wire fraud be retained and not undermined.

I. Background

Much has been written and said about the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In recent months, the principal focus has been on the private civil aspects of RICO in light of purported abuses of the statute and judicial attempts to preclude them by limiting its scope through interpretation.

On July 1, 1985, the United States Supreme Court rejected the two principal attempts at judicial limitation in its decision in Sedima, S.P.R.L. v. Imrex Co., Inc., No. 84-648 (July 1, 1985) and companion cases. In brief, the Court held that RICO does not impose a prior conviction requirement (a plaintiff need not establish that a defendant has been convicted of predicate offenses to state a RICO claim) and does not require a showing of a "special RICO injury" (injury beyond that caused in commission of the alleged predicate offenses). The Court clearly indicated that if the scope of RICO is to be limited, it must be limited by Congress. As a result, the focus has shifted from the courts to Congress and these hearings.

Scholars, practitioners, the courts, and witnesses testifying before this Committee have conducted exhaustive examinations and analyses of the legislative history of RICO with particular emphasis on private civil RICO. Most have concluded that, in many instances, RICO has been utilized in manners never intended by Congress in 1970. However, these studies were conducted in the context of appellate review. Now that the Supreme Court has rendered its decision in Sedima, the questions of what Congress meant and intended in 1970 should be secondary to considerations of what RICO should mean in 1985 and beyond.

NASAA's interests in Congressional review of private civil RICO are twofold. First, we believe that private civil RICO actions in the mail, wire and securities fraud areas are valuable components in the general federal statutory framework structured to combat white collar fraud in the nation. Second, the weakening of any private civil deterrent against fraud amplifies the burden placed on law enforcement agencies in general, and the elimination, limitation or dilution of private civil RICO at the federal level may have an equal consequence on state RICO-style laws in particular.

At least twenty-two states and Puerto Rico have some form of state RICO-style laws, or so-called "little RICO's". Generally, they are modeled on federal RICO though there are numerous variations. Most "little RICO's" provide criminal and civil authority to the states as well as some form of civil redress to private plaintiffs. In addition, many of the statutes include among the delineated predicate offenses not only those offenses described in federal RICO (including federal mail, wire and securities fraud) but also the state blue sky law provisions.

The development of state RICO law practice is in its germinal stages. While significant "little RICO" programs have been undertaken by several state attorneys general, the blue sky applications of "little RICO" are as yet untested in any real sense. As a result, NASAA has little direct experience on which we can rely with respect to the specific issues involved in the debate over private civil RICO. Nonetheless, having studied these issues and the arguments made by experts both pro and con, and based on our deep involvement and on-hands experience in dealing with white collar fraud, we believe we can provide a unique perspective to these proceedings.

II. White Collar Fraud in America- A Less Sanitized Perspective

Throughout the literature in which private civil RICO is assailed there runs a common thread: private civil RICO was intended as a weapon to attack "Organized Crime" in its efforts to infiltrate "legitimate business" and instead, it is being abused, used to victimize "legitimate business" in what amounts to nothing more than "commercial disputes." We believe this premise requires close examination.

Admittedly, the common sense meaning of the phrase "organized crime" is the Mafia, La Cosa Nostra, Al Capone and The Godfather. These are but the most visible of the criminal organizations. Investment-theme fraud is a problem of staggering proportions, perpetrated by clever swindlers over a period of many years, involving intricate webs of corporations, banks and individuals. They constitute a major element of organized crime in this country which can no longer be ignored.

In his book The Fountain Pen Conspiracy, Jonathan Kwitny detailed many of the prominent white collar scams of the Fifties and Sixties and described the people who pulled them off.

> And they are organized. A stock scheme that pops up one day in Panama will hit the markets of Europe, Canada, the United States, and the Bahamas almost before the sun can rise again in all those places. Illegal securities - whether stolen, forged, or just dreamed up - spread through the swindlers'

> network from coast to coast and across the oceans with ruthless efficiency.
>
> ... One can only guess from their activity how well they are organized. That any one man could control them, or could contrive all their operations, is unlikely. But that they communicate with and rely on each other regularly seems beyond doubt. The swindlers themselves are not Mafiosos, but Mafiosos frequently turn up in their manipulations. Authorities disagree over whether the mob controls the ring, cooperates with the ring occasionally, or merely extorts a cut of the profits as it does in so many other kinds of crime. (See P.15-16).

In testimony before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, in both 1982 and 1984, it was established that thousands of investors across the country were being defrauded by well-developed and efficient rings of boiler room operators pitching precious and strategic metal investments and oil and gas lease lottery programs. This is organized crime in any sense of the phrase, posing as grave a threat to the economy and public as any other cabal bent on crime.

The scope of the problem is astonishing. In a recent article on current scams, Forbes reported that "...the U.S. is in the grip of the most devastating epidemic of investment swindles and near-swindles in its history." (May 20, 1985 at P.38). Although no one knows for certain, annual losses to investment-theme fraud in America are now an estimated $40 billion, approaching the income derived from illegal drug trafficking. In her book Wayward Capitalists, Susan P. Shapiro reported that while an average robbery netted about $338, the average net to a convicted federal white collar criminal was about $300,000, and the average loss to victims of matters investigated by the U.S. Securities and Exchange Commission was about $400,000. (see P.9). In testimony before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs in March 1984, an attorney for the California Department of Corporations reported that there were an estimated twenty-five illegal precious metals dealers operating in Southern California and that each had income of as much as $10 million per month. On June 6, 1985, the Los Angeles Times reported that the number of illegal metals dealers in Southern California now approaches sixty. The Chilcott scam in Colorado in the late Seventies and early Eighties took in $70 million, J. David Dominelli took in $200 million in San Diego, International Gold Bullion Exchange netted $72 million and Bullion Reserve of North America $60 million. There are likely a dozen or more scams going on at this moment of equal or greater severity. The true scope, impact and damage is all but unfathomable.

How do these scammers get away with it? According to Mr. Kwitny,

> The common denominator is a psychological element in the victim that people often mistake for greed. The victim's greed no doubt plays a role in many swindles, but another characteristic is more important and universal. That is the overriding fear of looking stupid.
>
> The strongest tool in the swindler's kit is not the lure of money, but his ability to convince his victim that only a fool would pass up the opportunity being presented. Somewhere in the human psyche lies an element that induces many people to hand over their savings rather than risk the possibility that some total stranger might think them stupid. If this element did not exist, neither would the fine art of swindling. Some con artists are fond of saying, "You can't swindle an honest man." (The Fountain Pen Conspiracy, P.12)

Forbes reported that "The key to all scams is credibility. The suckers, whether they are rich or poor, informed or ill-informed, seem to be willing to take the scheme on faith." (May 20, 1985 at P.39). In Wayward Capitalists, Ms. Shapiro wrote

> White-collar criminals cultivate trust. They disarm the protections that have been enacted around property and economic transactions and steal freely. Trust allows property thieves to steal without direct contact with victims or physical proximity to the property appropriated, hence protecting themselves from the risk of discovery and apprehension. Trust expands the time frame of victimization from the

> monetary encounter of a mugging, burglary, or shoplifting to ongoing long-term opportunities for repeated victimization. (See P.8).

Therefore, by capitalizing on greed and fear of not making a sharp deal, by gaining credibility and cultivating trust, white collar criminals invade and infiltrate legitimate commerce. They make themselves difficult if not impossible to distinguish from honest business persons. Stephen S. Trott, Assistant Attorney General, observed in his written statement submitted to this Committee on May 20, 1985, that

> Large organized crime and racketeering ventures inevitably infiltrate or otherwise affect the nation's legitimate business and economic structures. For this reason they are generally recognized as presenting the single most serious challenge to the maintenance of a free and democratic society. No matter what particular crimes are committed by these ventures to accumulate or extend their wealth and influence, it is their acquisition of legitimate facades that aggravates the problem, and it is their scale of activity and their organized nature that perpetuates it. Moreover, the operation of such enterprises not only depends upon the direct and indirect commission of numerous crimes, but it is otherwise criminogenic. The example of criminal enterprises, and also supposedly legitimate enterprises, routinely operating by means of kickbacks, bribes, persistent frauds, and other kinds of illegal conduct, is infectious. The attitude develops that, since "everybody does it", it makes no sense for a small business or an individual to try to succeed solely by honest means. The result is widespread public cynicism, and an overall erosion of deterrence. (See 35-36).

Not only do the fraud feasors cause their own direct harm, but they undermine the entire fabric of commerce.

It seems that almost every day we read of trusted, credible and -- if you will, "legitimate" -- individuals and businesses who have betrayed that trust, credibility and legitimacy through fraudulent conduct. We do not mean Mafia-dominated unions or businesses. We mean the likes of a respected banker, a governor, a court system, industrial giants and securities brokerages firms of high stature. Their criminal conduct did not involve momentary lapses in judgment but carefully conceived programs, premeditated schemes to cheat, thieve and gain unfair economic and competitive advantage and benefit. The undermining of the economy and commerce by these elements has had just as great if not more dire consequences as has the Mafia.

There is a general misperception that white collar crime is not all that serious. This misperception is exemplified by the difficulty encountered in convincing prosecutors to pursue white collar crime cases, in convincing juries of guilt and in obtaining meaningful sentences from judges once convictions are returned. Euphemisms like "commercial disputes," "commercial frauds," "garden variety frauds" and "technical violations" underscore the problem. These are sanitized phrases often used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks. Yet all willful fraudulent conduct has in common the elements of premeditation, planning, motivation, execution over time and injury to victims and commerce. And it is all crime.

In summary, white collar fraud in America is a "growth industry" netting $40 billion a year. It is a crime based on faith not force, trust not terror, and, as such, is perpetrated not by thugs and hoodlums but by salesmen and financiers. It is committed not only in the boiler rooms of Fort Lauderdale but also in the conference rooms of Wall Street. Reported with ever increasing frequency, it seems almost commonplace and to be expected. This trend must be reversed.

III. Private Civil RICO - Why It Should Be Retained?

> The leading financial law firms who have been systematically carrying on a campaign against this Act have been seeking - now that they and their financial clients have come out of their storm cellar of fear - not to improve but to chloroform the Act. They evidently assume that the public is unaware of the sources of the issues that represent the boldest abuses of fiduciary responsibility....

This is not a quote discussing RICO in 1985 but a portion of a letter written fifty years before by Felix Frankfurter regarding the just enacted Securities Act of 1933 (See Joel Seligman, The Transformation of Wall Street at p. 79). Another attorney and luminary of the time warned that the complexity and severe civil liability sections of the Securities Act of 1933 would

> "...render financing exceedingly difficult, if not impossible, in the case of corporations with extensive interests.... [and that although] ...the writer is in full sympathy [with the purposes of the Act], ... it seems hardly necessary to burn down the house to exterminate vermin." (See Seligman at p. 77).

Thus, it is clear that the debate over private civil RICO is neither the first nor will it be the last of its kind.

NASAA believes that private civil RICO should be retained in its current principal form because we believe the statute will prove to be a valuable and powerful deterrent against organized investment-related fraud. The fact that it has not yet been used to its potential is not surprising.

In Model State Legislation on Sophisticated Criminal Activity (ABA, April 18, 1985) at p. 56-7, a minority of the Committee on RICO of the American Bar Association Section on Criminal Justice wrote

> The majority does not present any evidence, however, that inclusion of commercial fraud as a predicate act under the proposed legislation will do anything to stem the supposed rising tide of fraud in this country, or more to the point, in any particular state.... [N]o evidence exists that civil RICO suits have helped cleanse the marketplace of fraud. Thus, the supposed benefits of including commercial fraud as a predicate act are speculative, in contrast to the concrete detriment that abusive civil RICO claims will undoubtedly inflict on legitimate business and society, amply demonstrated by federal experience.

In response, not enough time has passed to allow private civil RICO to gain widespread acceptance and understanding. The statistics developed by the Task Force on Civil RICO of the American Bar Association Section of Corporation, Banking and Banking and Business Law indicate that 97% of all federal private civil RICO cases have been decided since 1980, out of a total of 270. It is difficult to draw any conclusions from such a small sampling. Second, one must wonder how it could be demonstrated that private civil RICO was helping to stem the tide of fraud in America. RICO is but one of an array of elements in the program against white collar crime. It would be difficult if not impossible to establish the impact of any single component.

In a survey conducted for the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law (March 28, 1985), a significant number of the attorneys with RICO experience stated that:

> ...Civil RICO provides incentives for persons injured by habitual securities law violators, racketeers, and others engaging in repeated criminal activity to pursue claims that might not be worth litigating without treble damages and attorneys ' fees.... Civil RICO [is] an effective means of deterring sophisticated business fraud and other improper business practices. (See P. 63).

In the Sedima decision, Justice White and the majority recognized the "private attorney general" aspects of private civil RICO. In fact, at Footnote 9 of the opinion, one of the reasons expressed for rejection of the prior conviction requirement was that private parties would exert "unhealthy private pressures" on prosecutors to pursue matters in which they were involved were such a requirement to be read into the statute. Mr. Trott stated the Department of Justice view that private civil RICO was an effective fraud deterrent yet to be fully utilized (See Statement P. 45-7), as did the majority of the ABA Section on Criminal Justice Committee on RICO. In summary, there can be little question that given time, private civil RICO, with its treble damages and attorneys' fees provisions, will enter the mainstream of white collar fraud litigation and serve as a significant deterrent to those who would contemplate such conduct.

The need for such deterrence has never been greater. At the same time we experienced a virtual explosion of white collar crime, we have also experienced significant efforts to limit government spending and staffing. According to a GAO report, while inquires and complaints to the Securities and Exchange Commission's Enforcement Division increased 341% between 1977 and 1983, Enforcement Division staffing dropped 3.6% (See Statistics On SEC's Enforcement Program, March 25, 1985). Forbes cited Representative Wirth as stating that the SEC staff had decreased by 5% in the last five years (May 20, 1985 at p. 42). The Commodity Futures Trading Commission is currently facing a 15% budget cut. In general, NASAA's membership jurisdictions are encountering similar constraints.

The result is predictable. With limited resources and staffing, priorities demand that only the most serious matters be pursued. Those persons who fall victim to fraudfeasors who are not pursued by the government must fend for themselves. All too often, the violators get away with their crimes even in the face of strong statutory remedies. The greater the motivation to sue, the more likely is the effectiveness of the deterrent. NASAA's position is that the prospect of private civil RICO actions will provide an effective deterrent against white collar fraud in the near future, if it does not already.

The value of the statute as a deterrent must be weighed against the potential for its abuse. While so much has been written about the purported abuses of civil RICO, perhaps too much emphasis has been placed on them. Primary among the alleged abuses are threats of labeling a potential defendant a "racketeer" and treble damages suits. In the ABA Ad Hoc Civil RICO Task Force Report it was reported that of those who had been threatened with such exposure, the only result was increased intransigence in settlement posture. (See P. 60). Are those who fear the stigma of being labeled a "racketeer" somehow less concerned about being labeled a "defrauder"? In Sedima, Justice White stated:

> As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings.... If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain the defendant is guilty of fraud beyond a reasonable doubt. (See P. 12-13).

Finally, the ABA Section on Criminal Justice Committee on RICO majority takes issue with the claims of abuse (See P. 50-51). In summary, the majority believes that the claims of substantial abuse are unproven, that there are sufficient safeguards against abuse in existence and more can be created, that even if abuse exist, they are outweighed by the benefits of RICO, and that some abuse of the statute is insufficient ground to deny its benefit to appropriate victims. NASAA concurs.

IV. Responses to Senate Thurmond's Questions

On January 8, 1985, Senate Thurmond gave a speech in which he posed seven questions to be addressed in these hearings. We will attempt to address each one.

"First, how can the Congress best provide strong remedies for victims of organized crime, without creating weapons to be used by one business competitor against another?" We have addressed this question at length in this Statement. RICO already provides strong remedies for victims of organized crime. Unfortunately, to a greater extent each day, established businesses are resorting to methods of organized crime to gain unfair advantage over their competitors. To the extent that this occurs, the competitor is a victim and should have RICO remedies available to him.

While we question the extent of abuse implied by the question posed, we believe adequate safeguards are in place and available to prevent and deter unacceptable abuse. Among these are local Bar disciplinary proceedings, spurious litigation suits, and as we will describe in a moment, RICO itself.

The Supreme Court charted the course of private civil RICO actions in the future with its emphasis on "pattern" in Sedima (See P. 16 Footnote 14). It is likely that Justice Department RICO Guideline IV will be asserted at the private level requiring transactions in more than one criminal episode to be shown in order to establish a "pattern of racketeering activity". In addition, RICO requires that predicate acts be indictable acts and offenses. In the securities law context, the requirement is willfulness. Merely negligent conduct will not meet the statutory requirements for predicate acts under RICO. Hence, truly nuisance or abusive suits will fail.

"Second, is there a need for change in the 'predicate offenses' which trigger RICO violations, including more specificity in connection with offenses that are described in general terms? Mail, wire and securities fraud offenses must remain as predicate offenses for purposes of private civil RICO actions. NASAA expresses no opinion on whether more specificity regarding these or other predicate offenses is required.

"Third, should a RICO criminal conviction be required before a private suit could be brought?" No. The Sedima decision delineated excellent reasons why this crippling requirement would not work.

"Fourth, should equitable remedies be available to the private claimant, in addition to treble damages and recovery of attorneys' fees?" Authority to freeze assets and preliminarily enjoin fraudulent conduct should be studied. The aggressive remedies of treble damages and attorneys' fees are useless if assets are hidden or dissipated by defendants during litigation.

"Fifth, how can the prerogatives of the states best be protected in this area?" We do not believe one could find many persons involved in blue sky law enforcement who would not welcome enhanced federal civil remedies for the victims of fraud. The subject of this inquiry concerns what has been characterized as the federalization by RICO of standard fraud claims previously relegated to state law and court. This is less a question of preserving states' rights and more a question of limiting the grounds upon which a private civil RICO action might be based.

The ABA Section on Criminal Law Committee on RICO majority reported that contrary to the fears expressed by critics, the federal court system has not been inundated with civil RICO actions, and the actions based on fraud would in large part be brought in federal court in any event. (See P. 47-49). In his Statement before this Committee, Assistant Attorney General Trott reached a similar conclusion (See P. 40).

From a philosophical point of view, the deterrence to organized criminal conduct intended by treble damages and attorneys' fees provisions implies a significant basis for justification of this "federalization". From a practical standpoint, frauds of material scope should be subject to suit in federal court.

"Sixth, what should the burden of proof be in Civil RICO suits?" The lesser the burden on plaintiffs to prevail, the greater the likelihood of redress and deterrence. However, the lesser the burden of proof, the greater the potential for overreaching. NASAA does not believe a "beyond a reasonable doubt" standard of proof would be appropriate in private civil RICO actions, as this might have a serious adverse impact on the deterrence factor of these remedies, as well as on civil RICO actions brought by the federal government and by state governments under "little RICO's". However, we believe the concept of burden of proof in RICO actions deserves further consideration.

"Finally, should involvement of organized crime be required as an element of proof?" No. The pattern requirement in existence and the requirements which may evolve are all that should be required in this regard. It is almost certain that a statutory description of the Mafia could not pass Constitutional muster. Even if it could, such a nexus requirement would limit the scope of RICO to that ring of organized criminals to the exclusion of the other rings of organized criminals operating throughout the nation now and those which will follow.

V. Conclusion

In Sedima, Justice White stated that:

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. ....Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" ...Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises.... The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. (See P. 19).

In reading much of the anti-private civil RICO literature, one gets the impression that it is virtually inevitable that in engaging in modern American commerce, a legitimate, honest, ethical enterprise will commit indictable federal mail, wire or securities fraud twice in a ten year period. Since "everybody does it" and since it merely amounts to a "commercial dispute", traditional remedies, not RICO, should apply. NASAA rejects this premise completely. Fraud is not unavoidable, it is corrosive, unacceptable and intolerable. Those who engage in patterned, planned, organized fraud should be subject to every governmental and private sanction available, be they Don Corleone, J. David Dominelli or E.F. Hutton.

> If the swindling is to be stopped, judges, parole boards, and other public officials must recognize that the con men are deliberate professional criminals....
> ...They steal because they like it.... (Jonathan Kwitny, The Fountain Pen Conspiracy, at P. 326)

Thank you for the opportunity to express our views on this most important subject.

Senator BIDEN. I would like to go back to Arizona for a minute. In fact, I would like to be in Arizona right now.

Senator DECONCINI. Excuse me. You may not; it is 120 degrees in Phoenix.

Senator BIDEN. I am told that if I knew the temperature, I may not; it is 120 degrees in Phoenix. I take that back. I would like to go Arizona in November.

At any rate, it seems as though Arizona—and obviously, we are only getting one side of it here—but it seems as though they have had pretty good success with their State RICO statute which, as I read it, is slightly broader than the Federal statute.

Let me ask you this question, sir. What kind of reaction have you gotten from the Arizona corporate community?

Mr. TWIST. Mr. Chairman and Senator Biden, Arizona has had a private civil right of action since 1978. In not one legislative session—and the State legislature in Arizona meets annually—has the business community, the accountants, the securities industry, or any other chamber of commerce group or other organized business group, come in to seek an amendment to the statute for any limitations.

Senator HATCH. He is talking about the Federal RICO statute.

Senator BIDEN. No. I am sorry. I was talking about the State. I want to know how they felt about the State statute.

Mr. TWIST. We have not been alone in our use of the civil RICO. A number of prominent corporations in the State, national corporations included, have been plaintiffs in RICO actions.

Senator BIDEN. Are you aware of Arizona cases that involve the use of the Federal civil RICO in Arizona?

Mr. TWIST. Mr. Chairman and Senator, it has not been used as often in Federal court as it has in State court, in part because the State statute, as you point out, Senator, is broader. As I said, we cover garden-variety fraud like a dark cloud under our State statute, and given our past history, there is a good reason for it.

Motorola, the Sprint people, the Arizona Bank, Wells Fargo Credit Corp., have all been plaintiffs in private RICO actions in superior court in Arizona. It has been generally well received. It is in part, I think, due to cooperation between prosecutors and the business community.

Senator BIDEN. As I further understand the statute, the requirement of the State law is that the civil RICO must be also submitted to the Attorney General's Office and the Attorney General has the opportunity to nix it, I guess—is that correct?

Mr. TWIST. And we have done that, Senator. In 1982, the legislature enacted that provision, requiring that all private civil suits be filed with the Attorney General. We have reviewed all of them; we have intervened, in some cases, on behalf of the plaintiffs, and in other cases on behalf of the defendants——

Senator BIDEN. I do not meant to cut you off, but in the interest of time, I know some of you probably have plans and the committee has another panel, but let me ask the other panelists whether or not they think a provision in the Federal statute similar to the State statute requiring the U.S. Attorney's Office in the district in which a civil RICO would be brought and they are required to sign off, what would be the view of—and let's start with you, Professor Blakey, if you would.

Professor BLAKEY. Senator, let me distinguish between an opportunity to intervene and be heard as opposed to a prior approval.

Senator BIDEN. Well, in this case, it is the ability to intervene——

Professor BLAKEY. To intervene——

Senator BIDEN. I am sorry. I thought that was what I said.

Professor BLAKEY. Well, the position of the National Association of Attorneys General and District Attorneys in the statement is that that kind of language ought to be added so that the Department of Justice could be notified and would have the opportunity to intervene and participate in frivolous cases, if they wanted to.

Senator BIDEN. Does anyone disagree with that on the panel?

Mr. FROHNMAYER. No. And, Senator Biden, I think for a very good reason—we do not have that notification provision in Oregon, and wish that we did—our statutory right to intervene is therefore less effective—and the reason is that obviously, the Government has no more interest in bad RICO appellate case law being made, whether it is made by its own hand or from advocates whom it cannot control. A notification provision does give a mechanism for orderly law development and coherence that we would find very useful.

Senator BIDEN. It seems to me—and I have many more questions, and I apologize—I was at another meeting prior to this one, and did not hear the other panel—and I very much wanted to ask the gentlemen from industry, particularly the banking industry, some questions—and I did not deliver an opening statement, but let me in effect make an opening statement in closing.

That is, in working with a number of legitimate business corporations in my 13 years' experience here in the U.S. Senate, I find that oftentimes, the chief executive officers of those corporations view potential penalty as far exceeding that which it in fact is, and also view the ability to bring an action against their corporation as being much easier than in fact it is. They are like that client, you know—"God, please send me a frightened and wealthy client," or whatever it is. They tend to be gun-shy, and with good reason on occasion. But things tend not to be as bad as they paint them to be, not because they deliberately attempt to mislead, in my experience, but because their counsel tells them, "You know what could happen to you here, if this happens, and oh my God, we have a real problem."

If you shed away some of the excessive positions taken on both ends of this issue, there seems to me to be a basis for some real comity here and agreement. No one is coming in and say do away with civil RICO completely on the one hand. On the other hand, everyone is coming up with different ways to deal with the frivolous action, assuming you have one, and dealing with the unscrupulous lawyer, assuming there is one in the case. And as we narrow this down a little bit, it seems as though there may be a basis upon which to essentially not change the burden of proof in any substantial way, which concerns me, quite frankly, about the fraud-plus requirement that you have, and possibly, move in the direction of (a) changing the name of the statute—unlike the gentleman who last testified, I do find that most people would much rather be called a defrauder than a racketeer, because today, racketeering in fact has the image and is thought of by most people, and most of my colleagues, as a Mafioso figure, living on Long Island, with a green eyeshade, counting his money and running drug and prostitution rings. No one wants to be called a defrauder, but in fact that is a hell of a lot better at the country club than being a racketeer.

So, it is not a distinction that I think is unimportant.

And second, it seems as though we should be able to, as a combination of two things—one is submission of the cases to the Federal U.S. Attorneys Office, and additional penalties, treble damages, against attorneys who are, in fact, frivolous, to begin to deal with what we all know in our profession—and we are all attorneys—exists, as it exists in any profession. And so, I guess my plea is that maybe we can begin to on the broad outlines of dealing with what in fact we call the statute, and what in fact are the sanctions that can be levied against the outrageous attorney and/or plaintiff, and in fact, if we can deal with making it a more difficult psychological burden for a frivolous claim to be filed, in light of the fact that they know they have got to drop it in the U.S. Attorneys Office at the same time—those three factors might go a long way toward dealing with what I think, in my view, the corporate community is worried more about what they think is going to come down the road than, in fact, what already has come down the road.

One last statement I will make—and I apologize for making a statement at this point, Mr. Chairman, but believe it or not, it would probably be shorter than asking the 15 questions I have here. I really think that for us to deal with white-collar crime as if it were not one of the most pernicious and serious abuses that exists in society today, and attempt to—and I know this is not the intention of Senator Hatch—but even psychologically, to let ourselves get moved into the arena where it is so much less egregious than the organized crime unit, is a serious, serious, serious mistake.

I think there is more done to undermine the functioning, the reasonable functioning, of the criminal justice system in this country and the civil justice system in this country, as a consequence of what appear to be blatant abuses of the law, without any impact upon those abusers, particularly in the white-collar crime area. We will be back at some moment in this committee with E.F. Hutton, I hope, and we will in fact be focusing on a couple of other items. But, for example, I am not sure that there is any more damage done to the credibility of the legal system by the *Jackie Presser* case than there is by the *E.F. Hutton* case. One is in the minds of the public viewed as kind of a racketeering kind of thing, and the other is business practices. The fact of the matter is that the message sent out when we do not deal with white-collar crime is that the system works well for whomever has the most money and influence to impact upon the system, and if you do not have that, it does not work. I think that is an exaggeration; I do not think that is true. But in a system that is essentially based upon the voluntary cooperation of the American people in order for it to be able to be sustained, it is very important.

And as we are all quoting former Supreme Court Justice and jurisprudential scholars, Jerome Frank wrote about it in "Law and Modern Mind," that the fact of the matter is that the perception of the existence of the notion of a judicial myth is important in the maintenance of the system, and the insistence of the notion that in fact, you cannot be involved in $40 or $50 or $60 or $100 billion worth or $20 billion worth of fraud and walk away from it without there being adequate penalties and remedies to get to you, whether you are a corporation or an individual is equally as dangerous.

So I guess, Mr. Chairman, what I am saying is that maybe you and I and others have a keen interest in this, and will be able to work something out, but I at this point am not convinced that changing, in effect, the burden, the basis upon which we must have the prerequisite for establishing the existence of a RICO offense, I think that is a mistake.

I thank the Chair, and I thank the witnesses.

Senator **Hatch**. Thank you, Senator Biden.

Let me just say, in your help to the committee, you might consider—and I happen to agree with Senator Biden that white-collar crime may be very pernicious and that all criminal activity should be treated very forcibly, and should be stamped out as much as we can. On the other hand, we are talking about situations here where there clearly is no criminal activity but simple contractual disputes—situations where lawyers are using criminal statutes in essence to extort, intimidate and perhaps use it for false reasons. And as you are giving us advice—and I would appreciate hearing from all of you personally, because I have enjoyed the testimony, and I think we have gained a lot from this panel. As you look at this, consider if you will that it is to get any court to rule that any suit is frivolous, or to get any court to rule that there was no reason to put the RICO account in a particular plaintiff's complaint. So virtually, unless we can solve that problem in a better way than present law does, it seems to me there is really no easy resolution of that problem. It is nice to say we can get treble damages against attorneys and against plaintiffs in frivolous suits, but you and I both know that to prove a frivolous suit would be difficult and would not address the primary frailties of permitting Federal jurisdiction, treble damages, and the racketeering label for normal business disputes.

Professor **Blakey**. Senator, there are two ways that you can handle this, as a matter of logic. You can deal with the problem after it occurs. That is the treble damage provision. You can deal with it before it occurs. And part of the suggestion here was giving the Justice Department an opportunity to take a look at it when it is filed.

Senator HATCH. Sure.

Professor BLAKEY. But there is another alternative, and I think you will hear it explained in a great deal more detail by Dominic Gentile, who is the Chairman of the ABA Criminal Justice Committee, and I would commend his suggestion to you.

Since a civil RICO case is essentially an allegation of a crime—when you allege RICO, although you do it in a civil proceeding, it is not terribly different than a homicide being murder, but also wrongful death; we do this all the time—it might make sense—and this is a procedural suggestion rather than a substantive suggestion—to build into the bringing of a RICO case something like a preliminary hearing, and give the judge the option, if he thinks the case is prima facie frivolous, to hold a preliminary hearing; if he thinks it is not prima facie frivolous, to let it go the normal track.

Senator HATCH. I understand that, but let's assume we go all the way through the case, and the accusation is made that this was a frivolous suit because the defendants won, and so on and so forth. We are going to need some suggestions on how you solve that.

Professor BLAKEY. This is on both ends—that if a frivolous case is brought, you get your damages, but before the case goes to trial, I am suggesting, before the case gets filed, the question is can you carry it forward. It might be possible to put a hearing in right at that point, on a preliminary basis, just like a preliminary hearing, in a criminal case, in which the judge can listen on a a limited hearing to see whether this is a justifiable RICO case. He can take affidavits, take evidence, and if he thinks prima facie it is meritorious, then it goes on the normal track; if he thinks prima facie it is not, he then relegates you to your non-RICO-type remedies.

Senator HATCH. Well, you get into all kinds of problems like if it is a criminal action, what standard do you use, et cetera. But give some thought to it, and write to us and let us know what you think.

Senator BIDEN. Mr. Chairman, on that point, I think you make a valid point about how hard it is to prove it is a frivolous suit, and how much of an impediment to an unscrupulous lawyer the prospect of treble damages would be. But it is interesting how we make the arguments about how easy or hard it is to prove treble damages. We went through, and you and I ended up on the same side of the case, with Illinois Brick and a few other cases, where we had Senator Metzenbaum pointing out that hardly ever is treble damages, in fact, imposed, and it really is not that much, and us sitting here saying, well, just the thought that that can happen forces people to settle.

Senator HATCH. Sure.

Senator BIDEN. Well, if that is true, and it works on corporate clients, it seems to me it would even work more readily on individual lawyers who see their whole law practice going before them.

Senator HATCH. It could be.

We are happy to have all of you here, and we appreciate the efforts you have put forth to be with us.

So, thank you for being with us.

We will now move to panel 3, which will consist of two witnesses—Dominic P. Gentile, Esq., of Dominic P. Gentile, Ltd., in

Las Vegas, NV; and Mr. Arthur F. Mathews, Esq., from Wilmer, Cutler & Pickering in Washington, DC.

We are happy to have both of you here today, and we will begin with you, Mr. Gentile, and go to Mr. Mathews. I hate to tell you this, but we have gone so long that I really am late——

Mr. GENTILE. You do not have to tell me. I know that, and I will go as fast as I possibly can.

Senator HATCH. If you can shorten your remarks, we will put the full statements in the record.

STATEMENT OF A PANEL, INCLUDING DOMINIC P. GENTILE, ESQ., DOMINIC P. GENTILE, LTD., LAS VEGAS, NV, AND CHAIRMAN, CRIMINAL JUSTICE SECTION RICO COMMITTEE, AMERICAN BAR ASSOCIATION; AND ARTHUR F. MATHEWS, ESQ., WILMER, CUTLER & PICKERING, WASHINGTON, DC

Mr. GENTILE. In light of the fact that I made the mistake of telling Bob Blakey what my idea was in the first place, he has already given it to you.

Thank you very much for giving me an opportunity to be here. I am Dominic Gentile, and I represent no one. I am here to just give you what views I have purloined from listening to some very bright people, I think, over the last year and a half. As you probably know from my statement, I am the Chairman of the American Bar Association Criminal Justice Section's RICO Committee.

I want to be very clear that I am not here as chairman; I am not here speaking on behalf of the ABA. It is my understanding that the corrected copy of my statement is what is in the record. I apologize to your staff, but the first one that came out, my secretary copied the first draft instead of the corrected copy, so we have taken care of that.

Senator HATCH. Without objection, it will be included in the record in full.

[The statement follows:]

STATEMENT OF

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Las Vegas, Nevada 89101

Mr. Chairman and Members of the Committee on the Judiciary:

INTRODUCTION

My name is Dominic Gentile. I am a trial attorney who, along with my associates, practices in the law firm of Dominic P. Gentile, Ltd., Las Vegas, Nevada. I am currently serving as Chairperson of the American Bar Association Criminal Justice Section RICO Committee. I have also served two terms as a member of the Board of Directors of the National Association of Criminal Defense Lawyers (1975-1980) and was Associate Dean of the National College for Criminal Defense (1977-1978). I am appearing before you today having been invited to do so as an individual practitioner involved on a day-to-day basis in the litigation of both criminal and civil RICO cases, and I thank you for the opportunity and the privilege of addressing you on the serious issues which this Committee is considering relating to civil suits brought under 18 U.S.C. Section 1964(c).

I have recently been enriched by the experience of chairing a committee which has spent the better part of three years studying the controversies, problems, and alleged abuses which have taken place under the criminal and civil sections of the Federal RICO Statute. This committee, which has been in existence since 1978, had its previous efforts ultimately become the American Bar Association's official recommendations for amendments to the RICO statute in 1982. The original goal of the committee was to analyze the state statutes which were then in existence, compare them to the federal legislation, evaluate them in the light of the problems which have been experienced in both the civil and criminal contexts, and attempt to create materials which would be of benefit to legislators, judges, and practitioners in determining whether there was a need for a state racketeering legislation and, if so, the form it should take.

Obviously, a substantial amount of time was spent focusing on the civil provisions of the federal statute and the questions surrounding the necessity for a civil provision, its appropriate scope of application, the problems associated with limiting it to identifiable defendants, and the possibility of engrafting upon current RICO practice some safeguards against past and future abuses. These subjects were discussed thoroughly at many meetings of the committee throughout the United States. Ultimately a report was published and is now being circulated by the ABA's Criminal Justice Section in order to solicit commentary and criticism.

Since so much of what I have to say today is the result of my committee activity, I think it is important to call to your attention the fact that the committee was structured so as to insure its work product would not reflect a defense or prosecution bias nor, for that matter, a criminal justice bias. With the backgrounds of the 26 participants on the committee, it is hard to conceive of a more comprehensive representation of the organized bar. I have attached as an addendum to this statement a copy of the membership roster of the committee so that you will realize the viewpoints I have heard that helped me develop the ideas which I shall attempt to express to you today.

THE LIBERAL CONSTRUCTION PROBLEM

While I recognize full well that this committee is focusing upon the problems of applying RICO in a civil context, because RICO provides a civil remedy for a criminal wrong, it requires that any analysis must focus upon the whole picture. Since RICO is to be "liberally construed to effectuate its remedial purposes", 84 Stat. 947 (1970), and since the Supreme Court has repeatedly recognized this and is currently literally construing virtually every statute which comes before it, it appears that there is virtually no legitimate way to change a court's focus upon RICO when it is applied as a civil remedy. Unless the liberal construction clause is removed from the statute, and the act is construed similarly to other penal statutes in a stricter fashion, then the problems which are complained of by so-called "legitimate" enterprises which are sued under RICO will continue.

There are many who claim that the application of RICO's civil remedy results in garden variety fraud claims being bootstrapped into federal treble damage actions. However, it is noteworthy that many of these same institutions utilize this same treble damage remedy when they are on the plaintiff's side of a lawsuit. They claim that RICO was designed to go after "traditional" organized criminal cartels such as the Mafia. However, Congress clearly knew what it was doing when it passed the statute in the language chosen. For better or for worse, the time has come to admit that the persons who operate some of the largest institutions in our country do not possess an abundance of rectitude and from time to time employ fraudulent strategies and tactics which, because of the economic power which they wield, make street thugs pale in comparison. There are literally billions of dollars each year illegitimately siphoned from individuals and small businesses as a result of this imbalance of economic power and the ability of major corporations and institutions to simply out leverage their customers and competitors. And since the hue and cry of the "legitimate" enterprises that become defendants in civil RICO cases generally focuses upon the inclusion of mail, wire, and securities fraud as predicate acts for the pattern of racketeering activity required to be pleaded in a RICO cause of action, I feel it is both efficient and appropriate for me to limit my discussion to this area. This is primarily because it is precisely in this area that big business does far more harm to our society as a whole than structured "criminal groups" can ever hope to do. And this is a sufficient justification for seeking an alternative means for correcting perceived abuses while at the same time leaving the statute unchanged with regard to the inclusion of mail, wire, and securities frauds in its prohibitions.

THE PATTERN OF ACTIVITY REQUIREMENT

Clearly the use of the civil remedies provided by the RICO statute is in its infancy. The mere fact that some individuals do not like to be characterized as "corporate gangsters" should not cause the Congress to throw out the baby with the bath water and abolish the civil remedial provisions of RICO in accordance with the quite vocal desires of certain special interest groups. If the RICO statute was a good idea to begin with (and that is certainly questionable) then the civil provisions of the statute should be given time to reach maturity before a decision to impose the death penalty is made.

The private attorney general concept upon which the civil provisions of RICO were based recognizes that the Department of Justice has limited resources and cannot muster an attack on every pattern of racketeering activity. Furthermore, it is clear that the victims of such activity are highly motivated to fight back against it where attorney's fees, costs, and treble damages can be recovered if they are successful. And since the Supreme Court decision in Sedima v. Imrex, _____ U.S. _____ (July 1, 1985), suggested that the fact that requisite predicate acts are proven does not mean that these acts fall into the type of "pattern" of activity which RICO prohibits, there are still many issues which have to be clarified through litigation before it can be said that there should not be a civil remedy in the RICO statute. In the institutional setting, these issues will involve questions relating to whether low ranking agents or employees of a large organization can cause that organization to become liable when they conduct themselves in such a pattern of activity; whether high level officials in a corporate "enterprise" can cause the institution to become liable where the predicate acts represent an insubstantial percentage of the total business of the corporation, etc. These are clearly not the types of questions that should be answered by a legislative body for they would most frequently turn on particular fact situations.

THE BURDEN OF PROOF IN CIVIL RICO

One of the most interesting and important questions for legal analysis presented by civil RICO is the issue of the quantum of evidence required to be produced so as to fulfill the burden of proof which the plaintiff in a civil RICO case must shoulder. Not very long ago it was my opinion that since the damages are based upon a pattern of racketeering activity which is criminal in nature then at least the predicate acts should be proven beyond a reasonable doubt with a sliding scale commencing once the predicate acts have been proven by that standard. However, it has occurred to me that if a civil plaintiff has met this burden then certain collateral estoppel problems might arise if the civil defendant is later prosecuted by a government agency, state or federal. For this reason I believe it to be unwise to require the beyond a reasonable doubt standard to be utilized at any stage of the civil proceeding.

On the other hand, since an unsuccessful defendant in a civil RICO suit will be carrying the stigma of having been found to be a "racketeer", it seems only fair that he should be afforded protections which at least approximate those granted to a criminal defendant. Although current jurisprudence under RICO establishes that the burden of proof in a civil proceeding is satisified by a showing that meets the preponderance of the evidence test (United States v. Cappetto, 502 F.2d 1341, 1357 (7th Cir. 1974) (government civil action remedial, not penal; preponderance of the evidence), cert. denied, 420 U.S. 925 (1975); United States v. Local 560, International Brotherhood of Teamsters, 581 F.Supp. 279, 327-28 (Dist. N.J. 1984) (government civil action; not penal sanction, significant deprivation of liberty or stigma; relief equitable and remedial; preponderance of the evidence); Alcorn County, MS v. U.S. Interstate Supplies Inc., 731 F.2d 1160, 1169 (5th Cir. 1984) (private suit; preponderance of evidence)), a majority of the ABA Criminal Justice Section RICO Committee felt that since a civil RICO claim alleges criminal conduct and may trigger drastic injunctive remedies, treble damages, and attorney's fees, proof beyond a mere preponderance of the evidence should be required. In the committee's model state statute the "clear and convincing" standard of proof was included because it was felt that it struck an appropriate balance: protecting the rights of civil defendants while allowing plaintiffs with strong proof of violations successfully to prosecute their claims.

There is precedent in both federal and state statutes for allowing a different standard of proof in civil actions other than a preponderance of the evidence. Since the RICO statute is unique in many aspects in that it is a hybrid between civil and criminal law, the majority of the committee felt comfortable in requiring a higher standard of proof than that under the majority of civil statutes. And since the civil suit does not threaten loss of life, incarceration, or conviction of a crime, the standard of proof beyond a reasonable doubt was thought too severe notwithstanding the fact that the collateral estoppel question was not addressed.

It seems clear that by requiring a higher standard of proof at the start of a lawsuit would deter some frivolous lawsuits particularly in light of the sanctions which can be applied by a federal district court utilizing Federal Rules of Civil Procedure 9(b) and 11.

MENS REA REQUIREMENT

The current language of the RICO statute does not include the element of scienter as a part of the prohibited activities outlined by 18 U.S.C. Sections 1962(a), (b) and (c). Without some scienter requirement, the activity delineated by these subsections virtually becomes strict liability situations. In the context of the civil remedy this is abhorrent and contrary to the usual elements necessary to impose criminal liability for the predicate acts which are the foundation for the civil remedy. These traditional elements require both an evil mind ("knowingly") and an evil act.

By the same token, even civil fraud requires an intent element. However, when the civil treble damage remedy is imposed it is not imposed for the fraud itself but for the "pattern of racketeering activity". I believe that the provisions of 18 U.S.C. 1962 (a), (b), and (c) should be modified so as to make it clear that the perpetrator of the fraud must not only intend the fraud itself, but also intend to be acting "in a pattern". This should not necessarily carry forward so as to require a specific intent to do damage to the specific plaintiff. That is so because it would be virtually impossible to prove both in the criminal and civil context, and it is the "enterprise criminality" that Congress sought to attack by the RICO statute, not the predicate acts which are already proscribed by law.

THE CIVIL REMEDY IN THE CONTEXT OF A RICO CONSPIRACY

If a "pattern of racketeering activity" requires the predicate acts be "interrelated by a common scheme, plan or motive" then by classical conspiracy analysis, a conspiracy is already proven and is in fact implicit in enterprise criminality. Therefore, if the conspiracy element remains in the statute as a separate offense and is applied on the basis of the "common scheme, plan or motive" which is required to prove the "pattern", an illogical result is produced. It would be somewhat like making it an offense to conspire to engage in a conspiracy. Since the case law of several circuits makes it very easy to join persons who merely assist the "enterprise" in achieving some of its objectives without even knowing of the existence of the "pattern" with substantive RICO violators (United States v. Carter, 721 F.2d 1514 (11th Cir. 1984); United States v. Tille, 729 F.2d 615 (9th Cir. 1984)), and since pleading a civil RICO claim in light of the liberal construction clause could permit serious abuses in a situation where 18 U.S.C. 1964 (c) is applied in a conspiracy to commit RICO context, it would serve both the criminal and civil purposes of the RICO statute best to repeal 18 U.S.C. 1962(d). Furthermore, in the criminal context, it would permit multiple punishments to be imposed for virtually the same acts. The proof required for a conviction under 1962(d) offenses and offenses under 1962(c) would be virtually identical. Yet they would constitute separate offenses and could merit separate penalties. Such a result should be avoided. Furthermore, the repeal of 1962(d) will not prohibit the government, in an appropriate case where the criminal law is violated, from proceeding with a traditional conspiracy prosecution.

THE CONCEPT OF A PRELIMINARY HEARING

It is clear that in the criminal context a defendant may not be prosecuted for a RICO violation unless and until an indictment has been returned by a grand jury or a preliminary examination and a finding of probable cause has been entered by a magistrate after conducting a hearing pursuant to Federal Rule of Criminal Procedure 5.1(a). While it would be novel to the practice in the federal courts in a civil context, such a screening of civil claims has long been utilized in medical malpractice cases on the state level. If such an amendment were made to the RICO statute which would provide a defendant in a civil RICO action the right to demand a preliminary examination wherein the plaintiff had to come forward and present sufficient evidence to establish probable cause to believe that each and every element of the claim was supported by some proof, then it would provide sufficient protection to civil RICO defendants and insure that expensive discovery costs and litigation expenses would not be incurred. Such a legislative amendment should include a right for the defendant to recover attorney's fees and costs if the plaintiff is unable to satisfy the burden of proof at the hearing.

The end result of such an amendment would be that litigants with marginal RICO claims would be made to realize early on that they should be cautious in bringing a RICO action wherein they have insufficient evidence to establish the essential elements. It would give adequate protection to a truly innocent person or institution in that they would not be subjected to the charge of "racketeering" and the disgrace that comes with it without having an opportunity to meet it head on early in the proceedings and to be reimbursed for any costs, fees, and expenses which they had to incur. At the same time, it would preserve the statute in its current posture and permit the same institutions to utilize it affirmatively when they were unjustly damaged in their businesses or property as a result of a pattern of racketeering activity.

CONCLUSION

I thank you for the opportunity to appear and present my views. I hope that my comments will be helpful to the committee, and I welcome an opportunity to answer any questions that you may have.

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Mr. **Gentile**. It seems to me that what we have heard people say here today is that if it has webbed feet, and it waddles, and it has a bill, and it goes, "Quack, quack, quack," it is a duck. And I think that that is analogous to the situation of what is a racketeer. A racketeer has been defined today at the outset, by the first panel, as somebody who wears a striped suit and a black shirt and white tie.

The second panel said that a racketeer is someone who wears the same striped suit, but a racketeer may also wear a white shirt with a black tie. And I think that by this time, we have gotten down to "A duck is a duck."

Racketeering is conduct. Racketeering is not ethnic. Racketeering is not limited to small groups. And nobody wants to be called a racketeer, I assure you, Senator Biden.

One of the most difficult things to do in a criminal defense context, and in the civil context, in a jury situation, is to be sitting there, having the jury already prejudiced and biased against a defendant in a case because he has been labeled a racketeer in either the indictment or in the complaint. I mean, the bias is there already, and it is terrible the efforts that you have to put forth to try to get around that—they are monumental, and usually not successful.

So the pejorative probably ought to be removed from the statute. I think that is an idea that I noticed that you were responsive to. I had the opportunity to testify on the House side before Representative Conyers' committee, and it appears that both bodies are communicating on that issue.

I want to get to this preliminary hearing idea, because I heard both you, Senator Hatch, and you, Senator Biden, discuss the fact that you had some medical malpractice backgrounds. I do not know how much criminal law either one of you have ever practiced. That is all I have ever done.

Senator **Hatch**. Senator Biden was a prosecutor. I have done some——

Senator **Biden**. No. It was even worse than that. As the first ads of my opponent pointed out, I represented the junkies and the rapists—I was a criminal defense lawyer.

Mr. **Gentile**. Oh. I have tremendous empathy for you, Senator.

Senator **Biden**. I was always the "bad guy"—that was a joke. Would you strike that from the record?

Mr. **Gentile**. Federal Rule of Criminal Procedure 5.1(a). We already have a process in the criminal context for providing an opportunity early on, before in effect an answer or a plea of "not guilty" has to be entered, and that is, before a magistrate, there is a duty upon the party with the burden of proof to establish each element of the offense by some standard of proof. In that case, it is probable cause, of course.

As you both say, you both have medical malpractice backgrounds, as well. You know, for years, there have been medical malpractice screening committees in some States—some States have abolished it now; Nevada had one until a couple of years ago, and we do not have one now—but in any case, what we are talking about is we are talking about correcting the abuse of frivolous lawsuits and doing it early enough so that the stigma of the label is not carried, and also so that the expense of the lawsuit does not get out-of-hand.

Now, I would suggest that as a viable alternative to a lot of these amendments, that a procedure could be engrafted upon the RICO statute, because it is bottomed in a criminal violation, so that early on, before an answer is required to be filed, and at the request of the defendant in the civil case, something in the nature of a preliminary hearing can take place where the party with the burden of proof must come forward and make a showing on the elements of the offense that he uses as his RICO predicates.

All kinds of arguments can be made as to what the burden ought to be, et cetera. The fact is that this can be delegated to magistrates or even special masters, No. 1. No. 2, in these situations, they should take place before discovery takes place.

Rule 11 of the Federal Rules ef Civil Procedure, requires that when a lawyer signs a pleading, what he is saying is that he has investigated that case, and what he alleges, he can prove. Now, he does not say he can prove it by the burden that is required at the end of the case at that stage but he does say that he has got evidence there, and that he has investigated it himself. If that be so, then make him prove it early on—at least prove the essential elements that he is asserting—and hearsay, fine; affidavits, fine, but something—something so that the defendant, or the would-be defendant, in an abusive civil RICO case does not have to empty out his coffers to defend what would otherwise be a completely spurious complaint.

I do not think it is such a bright idea or a novel idea. It is already being used in the criminal context. You cannot force someone in a criminal case to go to trial, or even answer, until probable cause has been found either by a grand jury or at a preliminary hearing.

If RICO or whatever you are going to call it after you change the name, I hope, is bottomed in a violation of criminal law, then I do not see any reason why that same probable cause standard or something akin to it should not be substantiated before a defendant in a civil RICO should have to answer and incur the costs of discovery.

I had a lot of other things, but we are late, and I do not mind relinquishing the floor to Mr. Mathews.

Senator HATCH. Well, I have been very interested in your "Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation." A number of things that you are for in there seem to parallel what we have got in this preliminary bill that we have put in this week. But I would like you to look the bill over and give us further suggestions on what you think we might want to do there.

But you go farther than my bill, as far as the predicate standards and predicate underlying liability goes, and I would be interested in what you——

Mr. **Gentile**. Well, we apply a sliding scale on the burden of proof, too, starting out with clear and convincing on the predicate acts, and then down to a mere preponderance when you get to damages.

And also, a scienter requirement, so that you have to intend RICO, not just intend the predicate.

Senator **Hatch**. Yes; I was very interested in that.

Well, thank you.

Mr. Mathews.

Mr. **Mathews**. Senators, thank you for inviting me. I would just submit my statement, and I would rather take a couple of minutes just to address the remarks that have occurred.

Senator **Hatch**. Without objection, we will place it in the record.

Mr. **Mathews**. I emphasize that I speak individually. I do not speak for the ABA or for the task force, although my views obviously have taken shape as a result of studying this issue for approximately 2 years in connection with the task force.

I would like to say at the outset that I think there is a proliferation of litigation, and the comments on the prior panel that there have only been 500 cases are really not correct. There have been probably approximately 500 decisions in cases that have come to some reported decision, but it is clear that there are thousands of civil RICO cases that have been filed, but the Federal court system, no one keeps track of allegations and complaints, so we are dealing with a proliferation.

I also respectfully—because I think I identify with most of the philosophical issues that have been espoused—I think it is a mistake for the committee to look at this problem as a frivolous litigation problem. I think it is much different than a frivolous litigation problem. I think it is more a jurisprudential problem and an issue of federalism. And I think it is because of this. It is clearly because of the commercial fraud offenses in the statute—mail fraud, wire fraud, and securities fraud. It is clear that 80 percent or more of the cases implicate those predicate offenses, and it is clear that if one can narrow the reach of those predicate offenses, then you can narrow what is perceived as abuse in the statute.

But it is not necessarily frivolous use of the statute. The problem is that there has never been a Federal private damage cause of action for victims of mail fraud or wire fraud, while it has always been a Federal criminal offense. So, while a U.S. attorney or the Department of Justice can prosecute one of those land fraud operations in Arizona under a Federal offense of mail fraud or wire fraud, those victims never had a companion Federal damage cause of action to get their money back. And I presume the issue was whether or not that extended federalism too far, and is it not better to leave the victim to whatever rights the victim may have under applicable State laws.

But once you include those predicate offenses under the statute as predicate offenses in the RICO statute, the fact that plaintiffs use the statute for a Federal program that provides treble damages does not mean it is a frivolous use of the statute.

So I think the Senate must address more carefully the commercial fraud offenses and make a federalism determination as to how far, through the guise of civil RICO, does the Congress want to, in effect, create a Federal fraud cause of action. And it is a very difficult decision.

Senator Hatch, I know in your bill, which I have not read, but I did quickly read the Congressional Record comments that you made, you attempt to deal with that by requiring the proof of one other predicate offense beyond the commercial fraud offense. And I understand that in that connection, you attempt to deal with it to try to narrow the scope of the commercial fraud offense, because you feel it makes the statute too all-embracing and too elastic. That is one way to cut back significantly. I have not studied your bill enough or reflected on it enough to determine whether I personally think that that is the best way to cut back on commercial fraud offenses. As you know, in our task force report, we examine six or seven suggested ways, and the way you choose is one of the ways we examined, and indeed, had been recommended by the ABA Criminal Justice Section many years earlier, with respect to proposed amendments for criminal RICO.

Let me make my next point. I think the most important thing you do in your bill—and I hope the committee keeps this in mind—is you do not adopt the criminal conviction requirement. And I think that not being said in your bill is the most important part of your bill.

Senator HATCH. Well, I think that is true.

Mr. MATHEWS. You have some powerful interests who are advocating the criminal conviction requirement. I individually think that it may well be better than the existing statute; if you are going to do nothing at all, and maybe you adopt criminal conviction, I think it pretty much guts the statute. But I do not think it comes close to being the right way to go, because of the problems that Mr. Justice White spelled out in footnote 9 in the *Sedima* case—anybody who has ever been a prosecutor, anybody who is continually engaged in litigation, knows that it is not workable, it is impracticable to try to pin this civil remedy within 1 year after a criminal conviction when the Department of Justice does not investigate one-tenth of the situations that ought to be investigated, because of resources; it takes years to return an indictment. There is almost never a criminal conviction in a major white collar crime case within 5 years of the crimes that were committed. What do you do with the private plaintiff? Wht does the private plaintiff, do in pursuit of all other remedies—immediately, or must the private plaintiff wait 5 or 6 years until the witnesses are gone and the evidence is dissipated before he can bring is civil action.

So I cannot speak more strongly in my own personal view that the committee ought to find a way different from the criminal conviction requirement to narrow the commercial fraud offenses, if, in your federalism determination, you determine that you do not want RICO to be a general Federal antifraud statute. But I must say at the same time there are a lot of people who might argue that there is nothing so bad about having a general Federal antifraud statute.

And the second element of your proposed bill, Senator Hatch, on the racketeering enterprise injury attempt, to try to limit the scope of the statute, I have more problems. As you know, we spent a lot of time and effort in our task force report analyzing each of the profferred theories of enterprise injury or special injury. The problem I have with it is twofold. One, I am afraid it may be too metaphysical and too obtuse for any court to give it practical application. And second, I am afraid it does not distinguish between wholly illegitimate enterprises that may be infiltrated or may be used as a tool by illegitimate mobsters, racketeers, or continuing criminals.

And it would seem to me that when you talk about "wholly illegitimate enterprises"—for example, an illegal securities or commodities operation that is set up solely to tout, through high pressure over the telephone, nonexistent or worthless stocks, just in effect to steal money from purported investors—I fail to see why there would be any sense in denying the victims of the predicate offenses, the victims of the misrepresentation, the wire fraud, mail fraud, the securities fraud, or the commodities fraud, recovery, even of treble damages under the statute.

So I would encourage you and your staff, on the injury portion of your bill, to reread our chapter in our report and consider whether or not, if you stick to an injury concept in this statute, that you not necessarily take away the right from the victims of the predicate offense, particularly an illegal enterprise situation.

In that connection, I might add, because we have had such trouble struggling with the injury aspect—and the courts have been all over the place on this injury aspect—we put a chapter in our report on derivative responsibility, because my own view of what the business community is really complaining about is, the business community is complaining that they ought not be labeled racketeers and subjected to treble damages in cases where there may be agents or employees who may be crooks, or who may do some very serious wrongdoing, perhaps the very type of individuals that the treble damage remedy ought to hit. But these so-called legitimate businesses are saying, "We should not be dragged through the coals, labeled 'racketeers', and be subjected to treble damages for the acts of those lower-level people."

These businesses, I think, will acknowledge that they are going to be liable under the Federal securities laws, under the Federal commodities laws, under the banking laws, or under State statutes or under common law, probably on some form of respondiad superiore, or derivative liability theory in ordinary litigation. I do not think they are saying that we are trying to avoid that type of liability.

So what we tried to do in our report on a derivative responsibility recommendation was to adopt something that the Congress recently did in an amendment to the securities statutes, and that was the Insider Trading Sanctions Act, as an amendment to the Securities Exchange Act of 1934. The Congress determined that there ought to be a treble damage penalty, not a private cause of action, against inside traders, and the statute was passed about a year ago.

What the Congress did to accommodate the just concerns of the business community was to build into that statute a very strict derivative responsibility concept that, in essence, said while you could get treble damages against the registered representative, or the person that willfully and knowingly did the insider trading, you could not get the treble damage penalty against the broker/dealer or his employer unless you could prove that the employer in effect had knowledge of and condoned the violation, or had active participation in the violation. I mention it as one way to avoid dealing with what I think is a very metaphysical concept of the racketeering injury concept. You might accomplish the same goal by dealing with derivative responsibility as opposed to enterprise injury.

The other thing that I just would suggest quickly, and it is in my statement, there is no reason in any statute that Congress ought to put a one-sentence statute of limitations in. It is just craziness to have a plaintiff able to go into different courts of different States, on the same facts, and be subject to different statutes of limitations for the civil cause of action just because Congress did not speak to it. And in our report, we make reference to the 4-year antitrust statute of limitations, or the 5-year criminal statute of limitations. Myself individually, I do not think it makes any difference whether it is 6 years, 7 years, or 1 year. But the most important thing from my perspective is put in one sentence, and put in some statute of limitations.

I am sorry we do not have time. I would love to discuss this statute with the committee for days, but I realize how valuable the Senators' time is.

[The statement follows:]

Testimony of Arthur F. Mathews
on Civil RICO before the
Senate Judiciary Committee
(July 29, 1985, Washington, D.C.)

Mr. Chairman and Members of the Committee, I appreciate the opportunity to share with you my views concerning Civil RICO. As a private practitioner I have litigated a number of cases involving civil RICO treble-damage claims -- sometimes representing defendants, and at other times representing plaintiffs. As an academician, I have taught Civil RICO both in law school litigation courses, and at a number of CLE programs. Recently, I have served as Chairman of the Ad Hoc Civil RICO Task Force of the American Bar Association's Section of Corporation, Banking and Business Law. I know your staff has had access to the Task Force's March 28, 1985 Report which contains a number of recommendations concerning amendment of the Civil RICO statutory provision. I must stress at the outset, however, that I testify today solely in my individual capacity. Neither the ABA, nor its Section of Corporation, Banking and Business Law has officially adopted the Task Force Report, nor otherwise taken any specific position relating to whether Congress should amend the Civil RICO provision of 18 U.S.C. § 1964(c). Indeed, today I speak not even for the Task Force, only for myself.

First, I volunteer an opinion respecting Criminal RICO: The criminal provisions of 18 U.S.C. §§ 1961-68 constitute an important federal law enforcement weapon in our Nation's fight against organized crime and continuing criminal enterprises. As administered by the Department of Justice pursuant to its RICO Guidelines, these provisions are effective, and should not be substantially diluted, directly or indirectly, by any curative legislation designed primarily to deal with the overuse or abuse of the Civil RICO treble-damage provision in private litigation.[1/]

Second, I believe the scope and breadth of the Civil RICO provision is much too broad, and should legislatively be narrowed so that the statute cannot continue to be used as a general federal treble-damage commercial fraud statute. I do not believe that anyone has presented sound public policy reasons why plaintiffs in private litigation should be able to use Civil RICO to circumvent the restrictions and limitations contained in existing express or implied private damage causes of action under such federal statutory and regulatory schemes as the federal securities, commodities and banking statutes.[2/]

[1/] _See_ Statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, to the Committee on the Judiciary, United States Senate Concerning Civil RICO Suits (May 20, 1985).

[2/] _See_ Task Force Report at 1-50, 55-69, 239-282.

Third, I believe it would be impracticable and unworkable to attempt to remedy Civil RICO's overbreadth by legislating a criminal conviction requirement as a predicate for civil treble damage liability.[3] Let me come back to this point later.

Fourth, redefining and tightening the concepts of "pattern" and "enterprise" by statutory amendment would go a long way toward bringing Civil RICO within controllable bounds. Concededly, such legislation would affect Criminal as well as Civil RICO. However, the present Department of Justice RICO Guidelines indicate that the DOJ itself applies a restricted theory of both "enterprise" and "pattern" in its development of Criminal RICO prosecutions.[4]

Fifth, I believe the Congress should specifically legislate a narrow standard of derivative liability for Civil RICO treble damages against corporations and other organizational entities based upon the patterns of racketeering committed by agents, employees or other subordinates. The type of standard I favor has recently been adopted by the Congress in providing for derivative treble damage liability for illegal

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[3] *Id*. at 209-238.

[4] *Id*. at 137-162; 193-208.

"insider-trading" pursuant to the ITSA amendment to the Securities Exchange Act of 1934.[5]

Sixth, use of mail, wire and securities fraud as predicate offenses in pursuit of a Civil RICO treble damage claim should be restricted in some fashion so that every commercial fraud or contractual dispute cannot be converted into a federal RICO claim, and so that the legislatively and judicially imposed restrictions on private damage causes of action under the federal securities, commodities and banking statutes are not circumvented.[6]

Seventh, the Congress should legislate specifically a uniform federal statute of limitations governing all Civil RICO treble damage claims.[7]

There are a number of other recommendations made in the Task Force Report, all of which merit consideration.[8] However, I personally feel the factors I have noted are the issues that deserve the most important Congressional scrutiny. If I may, I will elaborate upon a few of my principal points.

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[5] *Id*. at 342.365.

[6] *Id*. at 239-282.

[7] *Id*. at 385-394.

[8] *Id*. at 427-434.

Criminal Conviction Requirement

In the Sedima case,[9] several of the Supreme Court Justices referenced the Task Force Report and certain of its observations. The Task Force attempted to set forth the pros and cons of a criminal conviction requirement. Among others, the Task Force noted the following arguments against requiring a criminal conviction:[10]

(i) It would remove most of the "private attorney general" concept built into the statute.

(ii) There appears to be little reason for treating a Civil RICO treble damage cause of action differently from a civil antitrust treble damage action where a criminal conviction is not required.

(iii) Application of the Civil RICO remedy would be skewed by the exercise of prosecutorial discretion. "It is likely that defendants will offer to plead to non-RICO criminal counts in order to avoid treble damage liability. Thus, the very criminal cases in which Congress felt a private damage supplement was appropriate, may be disposed of in a manner where the civil remedy cannot be utilized." In addition, the criminal conviction requirement might "put undue pressure on prosecutors to stretch the DOJ RICO Guidelines and charge Criminal RICO counts in borderline cases in order to give victims a chance to pursue the civil treble damage remedy. . . ."11/

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[9] Sedima, S.P.R.L. v. Imrex Company, Inc., ___ U.S. ___ (1985).

[10] Task Force Report at 233-238.

(iv) Complicated statute of limitations, splitting of causes of action, time lag, and issue preclusion problems would arise. In addition, by the time a criminal conviction is obtained (and sustained upon appeal), the defendant will likely have dissipated or secreted all his assets so that a subsequent civil treble damage judgment will not be collectible.

(v) A criminal conviction requirement might effectively preclude all forms of respondeat superior or other theories of derivative responsibility against corporations or other organizational entities in circumstances where public policy might warrant civil, but no criminal, responsibility.

(vi) Immunized culprits and fugitives from justice unfairly would be benefited by a criminal conviction requirement.

11/ Id. at 234 and n.357.

Mr. Justice White, in his majority opinion in Sedima listed the following "problematic consequences" of a criminal conviction requirement for Civil RICO:

> "It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive 'pattern,' or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The [requirement] would also create peculiar incentives for plea-bargaining to non-predicate act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications."12/

12/ Sedima, Slip Opinion (Majority Opinion of Mr. Justice White), at pp. 10-11, n.9.

Indeed, prior to the Supreme Court's reversal of the criminal conviction requirement imposed by the Second Circuit in Sedima, the Department of Justice was faced with a Court granting the request of a potential private Civil RICO plaintiff that the DOJ present a case to a federal grand jury -- which the DOJ did not feel warranted criminal prosecution. The Court felt the prospective plaintiff had an enforceable right to grand jury consideration of the defendant's conduct.[13] A criminal conviction requirement may spur prospective plaintiffs to seek mandamus of the DOJ to compel grand jury scrutiny of a host of peripheral or borderline cases to determine whether the grand jury would return a RICO indictment which might eventually lead to a criminal conviction and thereby be a predicate for civil treble damage liability.

For all of these reasons, I believe a criminal conviction requirement for Civil RICO treble damage liability would be unwise, impracticable, and wholly unworkable.

Pattern and Enterprise

Mr. Justice Powell, in his separate dissent in Sedima quoted the following observations of the Task Force about the RICO statute:

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[13] See, In re Grand Jury Application (S.D.N.Y., April 26, 1985), 1 BNA Civil RICO Report at 8 (July 24, 1985).

> "In an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime."14/

The present statute's failure to specifically and carefully define "pattern" and "enterprise," coupled with the failure by some courts to require more than proof of a "pattern" to constitute an "enterprise," has contributed to overuse and abuse of the Civil RICO provision. These two crucial elements in the

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14/ Sedima, Slip Opinion (Dissenting Opinion of Mr. Justice Powell), at 3-4.

statute should be defined legislatively much more precisely and carefully.

"Pattern" should be defined to require something more than two wholly unrelated predicate offenses in a ten-year period. As Mr. Justice White stated in his majority opinion in Sedima:

> "The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern'."[15]

At a minimum, the predicate acts constituting the pattern -- whether two or more in number -- should be related to each other as part of a common scheme. In addition, the underlying predicate offenses constituting the required pattern should arise in two or more separate and distinct criminal episodes. Two or more criminal charges arising from a single criminal episode or transaction should not be deemed to be a "pattern." The DOJ RICO Guidelines already expressly incorporate this latter interpretation.[16]

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[15] Sedima, Slip Opinion (Majority Opinion of Mr. Justice White), at 16, n.14.

[16] See, generally, Task Force Report at 193-208.

"Enterprise" should be defined to require something more than the underlying pattern of racketeering injury. The DOJ RICO Guidelines require that an enterprise be

> "an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity."

A statutory definition along these lines ought to be adopted.[17/]

The Supreme Court in Sedima noted two reasons for the Civil RICO provision "evolving into something quite different from the original conception of its enactors," namely: (i) the inclusion of wire, mail and securities fraud as predicate offenses, and (ii) "the failure of Congress and the courts to develop a meaningful concept of 'pattern'."[18/] With regard to the second reason, I believe the Congress should rectify that failure since the courts appear unable, or unwilling, to do so.

[17/] See generally, Task Force Report at 137-162.

[18/] Sedima, Slip Opinion (Majority Opinion of Mr. Justice White), at 20.

Derivative Liability

The Task Force pointed out:

> "Many of the perceived abuses of Civil RICO involve situations where a corporation is made a RICO defendant based upon acts of its employees or agents. These acts may be contrary to corporate policy. Any 'benefits' accruing to the corporation from these acts are often at most secondary to the primary goal of the offender to benefit himself; sometimes the corporation itself is victimized by the offenses. A classic example of this type of Civil RICO claim is the claim against a brokerage firm for the churning of accounts by a registered representative."[19]

The Task Force felt that in such situations -- "where the corporate entity plays the role not of perpetrator but of either victim of, or instrument for, the RICO offense" -- it would appear to be inappropriate to hold the entity liable for treble damages.[20] The general federal rule in civil cases for vicarious or respondeat superior liability of corporations for the wrongful acts of their employees or agents is that a corporation will be liable for punitive or treble damages when its agents have acted with apparent authority, regardless of actual authority or ratification, and in spite of the fact that the

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19/ Task Force Report at 342.

20/ Id. at 342-343.

agent has acted solely to benefit himself. This rule applies to civil treble damage liability for federal antitrust violations.[21]

I believe the Civil RICO treble damage liability of corporations and other entities on a respondeat superior or other derivative liability basis should be curtailed significantly. The Congress has done so recently in an analogous area: In the Insider Trading Sanctions Act of 1984 ("ITSA"), which amends the Securities Exchange Act of 1934, and provides a civil treble damage penalty for illegal "insider-trading," Congress adopted an apt limitation on derivative liability of a broker-dealer firm. Under ITSA, a broker-dealer firm will not be liable for treble damages for the wrongful acts of its employees or agents either (i) on a strict respondeat superior basis, or on such other derivative liability bases such as the "controlling persons" concept of Section 20(a) of the 1934 Act, or (ii) the traditional aiding and abetting principle. ITSA requires actual direct, significant participation in the proscribed conduct, in order for treble damage liability to be triggered. Absent meeting this strict test, only single damages would be recoverable against a broker-dealer firm upon a derivative liability theory in an illegal "insider trading" case.[22]

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[21] Id. at 348-351; see also American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

I believe Congress should legislate a limitation on derivative liability for treble damages under Civil RICO comparable to the ITSA limitation. I concur in the Task Force view that the proper limitation could

> "be patterned upon but slightly different from the lines of the strict Model Penal Code/State Law Criminal _respondeat_ _superior_ or derivative liability test. Under this strict test, a corporation will not be liable for treble damages under Civil RICO in instances where (i) there is no direct criminal involvement of either high-level managerial agents or top officers or directors, _and_ (ii) high-level officials or managerial agents had no knowledge of the criminal activities (knowledge exists if there has been 'conscious avoidance' or 'willful blindness' of offending activities by such high-level officials or managerial agents)."[23]

This limitation could operate in one of two ways. First, it could be phrased so the corporation could not be a defendant at all in a Civil RICO charge based solely on a derivative liability theory. The plaintiff might be limited to pursuing the corporate entity solely on non-RICO causes of action provided under other federal or state statutory or common law schemes. Or second, the corporation might be susceptible to being a Civil RICO defendant on a derivative liability theory, but only subject to single, not treble, damages. This latter approach would subject the corporation to possible exposure under RICO to an award of attorneys' fees, and perhaps some forms of equitable relief.

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[22] Task Force Report at 356-360.

[23] _Id_. at 364-365.

Mail, Wire and Securities Fraud

There is no doubt that the so-called "commercial fraud" predicate offenses -- i.e., mail, wire and securities fraud -- are a significant contributor to the breadth, and resulting overuse or abuse, of the Civil RICO provision. Some commentators have asked: Why not just delete these three predicate offenses from the RICO statute?[24] After all, their inclusion in the statute late in the legislative process at a time when the statute did not contain a private civil treble damage provision, was occasioned by little Congressional consideration of the effect their inclusion would have on other existing federal statutory schemes. The principal reason why the commercial fraud offenses should not be entirely deleted from the statute is the unduly confining effect this would have on Criminal RICO. Mail fraud particularly has been an effective, favored predicate offense in a large number of important federal Criminal RICO prosecutions.[25]

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[24] See, e.g., Rakoff: CODA: Some Personal Reflections on The Sedima Case And on Reforming RICO, 1 RICO: Civil And Criminal 395 (J. Rakoff and J. Wing, eds., Law Journal Seminars-Press 1984); Rakoff, "Opinion," 1 RICO Litigation Reporter 203 (Sept. 1984).

Why not then leave the "commercial fraud" offenses in the statute for criminal and governmental civil actions, but except them from the private civil treble damage provision? One problem with this approach is "it would preclude or make more difficult the use by state and local governmental units of federal Civil RICO as a plaintiff in cases where state and local governments have been defrauded; *i.e.*, government contract cases, political corruption, bribery, etc." The Task Force found:

> "The one area where there is the most likely chance of the statute being used by private parties and by state and local governments as a 'private attorney general' supplement to the federal government's civil and criminal implementation of the statute, is through use of the commercial fraud predicate offenses in cases where satisfactory private civil damages remedies neither exist under, nor are precluded by, other applicable statutory and regulatory schemes."[26]

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[25] Task Force Report at 239-264.

[26] *Id.* at 267-268.

The Task Force explored a number of alternative suggestions to narrow the breadth of the commercial fraud offenses under Civil RICO. I personally am unaware of all the policy implications of the various alternatives. One alternative that I believe, nevertheless, is worthy of exploration and consideration by this Committee is the proffered "regulated industry" exception or exclusion from the treble damage reach of Civil RICO through the commercial fraud predicate offenses.[27] This approach was outlined by the Task Force as follows:

> "Provide some sort of 'regulated industry' exception to exclude from coverage [under the treble damage provision of Civil RICO] cases (i) where victims of mail, wire and securities fraud predicate offenses have damage remedies (albeit single damages) under applicable federal securities, commodities or banking statutes, or comparable federal regulatory statutes, and (ii) where the Congress or the courts have determined pursuant to applicable federal securities, commodities, banking or comparable regulatory statutes that neither an express nor implied private cause of action should exist."[28]

Some type of "regulated industry" exception would go a long way toward precluding the use of Civil RICO to circumvent the restrictions contained in express and implied damage causes of action arising under other existing federal statutory and regulatory schemes. It clearly should resolve the criticism of Civil RICO levelled by the securities and banking industries. Whether this approach would satisfy the criticisms of the accounting profession or the insurance industry -- where direct federal statutory regulation does not exist -- would depend, I presume, on the express language and intended scope of any such exception. This approach merits Congressional discussion and consideration.

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[27] *Id*. at 268-272.

[28] *Id*. at 281.

Statute of Limitations

I am unaware of any significant opposition, even by potential plaintiff groups or plaintiffs' lawyers, to a statutory amendment providing an express, uniform statute of limitations for federal Civil RICO private treble damage claims. The precise number of years is less important than the fixing of some specific period. The Task Force suggested either the four-year (antitrust) or five-year (federal criminal) limitations period. Congress may have policy reasons to favor a longer or a shorter period. Whatever period is deemed appropriate, it should be expressly spelled out by Congress in the statute. In my view, federal courts waste too much time, and engender too much confusion, in attempting to provide limitation periods for federal statutes, like Civil RICO, that are silent on the issue.[29/]

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I commend to the Committee an analysis of the Ad Hoc Task Force Report. Many of my individual views have been shaped by my participation in the Task Force's exhaustive, scholarly review of the problems implicated by the Civil RICO provision. I am prepared to answer any questions at this time. Let me remind you though, that my comments are my own. I speak neither for the ABA, any of its Sections or Committees, nor for the Task Force.

[29/] *Id*. at 385-394.

Senator **Hatch**. We appreciate the testimony both of you have given. It has been quite enlightening—and the testimony of the other witnesses, as well.

Senator Biden and I have been chatting up here, and we will submit any questions we may have to you.

We appreciate all witnesses being here today. It is a very fascinating set of problems, and I have to admit, I am intrigued by basically every argument that has been made today, and I hope we can come up with some reasonable way of resolving these problems and yet still have justice occur.

With that, we will recess until further notice.

Thank you very much.

[Whereupon, at 1:08 p.m., the committee was adjourned.]

OVERSIGHT ON CIVIL RICO SUITS

TUESDAY, SEPTEMBER 24, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin Hatch (acting chairman) presiding.

Also present: Senators Thurmond, Grassley, Denton, McConnell, and Specter.

Staff present: Randy Rader, chief counsel.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. At the outset of this final day of hearings, I would like to commend publicly the chairman of the Judiciary Committee for scheduling these witnesses to testify on this important topic.

As discussed in our earlier hearings, the Racketeer Influenced and Corrupt Organizations Act has been an effective weapon against organized crime. In the wake of the Supreme Court's *Sedima* and *Haroco* rulings, however, RICO's treble damage remedy is being used almost exclusively to bring common law suits, which this committee will investigate today.

For example, financial disputes are falling almost exclusively under Federal court jurisdiction. Common law commercial disputes have become the basis of suits for treble damages and the shifting of attorneys' fees. Common law commercial disputes have caused legitimate businesses to be stigmatized as "racketeers," and this stigma has given litigators leverage in settlement negotiations because nobody wants their reputation besmirched or damaged by this ignoble epithet.

In an effort to address these disturbing consequences of the expansion of the civil RICO actions, I have introduced S. 1521. The most important provision of this bill would require at least one predicate racketeering offense to be an injurious activity other than mail, wire, or securities fraud.

These three offenses have formed the predicate for the vast majority of the suits against legitimate business entities. This bill would seem to be an appropriate vehicle to bring civil RICO back within the bounds intended by its authors. I look forward to working with my colleagues as well as the victims of unwarranted civil RICO suits in finding the most appropriate legislative correction.

This morning we have three panels. I am limited in time, so I am going to have to limit each witness to no more than 5 minutes. I will cut you off right at 5 minutes because of the time constraints.

We have three excellent panels with a wide variety of witnesses, experts in this field who I believe can help to educate the committee on what action should be taken in this area.

Before I call the first panel, I wish to place in the record the opening statements of several committee members, starting with Chairman Thurmond's statement.

[The statements follow:]

Opening Statement by Senator Strom Thurmond

Today the Committee on the Judiciary conducts its third and final hearing on the subject of civil enforcement provisions of RICO—the Racketeer Influenced and Corrupt Organizations Act.

RICO has provided a powerful means by which to deter and to punish organized criminal infiltration into interstate enterprises by making it an offense to invest the proceeds of racketeering activity in such an enterprise, or to control or conduct such an enterprise through a pattern of racketeering activity. Such violations are punishable by both criminal and civil sanctions.

The scope of the private civil remedy has been the subject of considerable litigation in recent years. (The manner in which civil RICO has been used has generated criticism that the statute is not achieving its intended purpose and, instead, is creating an undesirable and unnecessary federal remedy for fraud.

Indeed, the problems and concerns posed by civil RICO lawsuits are complex, and the Committee is grateful to the witnesses testifying at all three of these hearings for their excellent statements and good counsel.

I also want to compliment my distinguished colleague from Utah, Senator Hatch, for his profound interest and his leadership on this important issue. I look forward to working with him to correct by appropriate legislation some of the unfortunate consequences of current law.

Opening Statement by Senator Jeremiah Denton

Mr. Chairman, the Congress enacted the Racketeer Influenced Corrupt Organizations Act (RICO), as part of the Organized Crime Control Act of 1970, to provide prosecutors with a weapon against crime syndicates. The criminal statute also provides for a civil remedy for victims of organized crime.

RICO makes it unlawful for any person to use a pattern of racketeering activity, or any income derived from it, to conduct or acquire an interest in an "enterprise." "Pattern of racketeering activity" has been defined to require two acts of racketeering activity within ten years.

Since its enactment, the RICO statute has been used successfully countless times to attack the pornography industry. With the addition to the definition of "racketeering activity" of state and Federal offenses involving obscenity, it is anticipated that the RICO statute will allow an even broader attack on the industry.

Mr. Chairman, I am aware of the raging debate about the application of civil RICO against business people in cases of commercial fraud. I commend you for examing that issue here. I hope, however, that any criticism or proposed modification to the RICO statute will not adversely affect the criminal or civil application of RICO to cases involving pornography.

I look forward to following today's debate and working towards the resolution of any possible misapplication of civil RICO.

Thank you, Mr. Chairman.

Opening Statement of Senator Mitch McConnell

Mr. Chairman, I commend you once again for holding this hearing, a follow-up to the hearing held earlier this year on the same subject. The issue is one that is extremely important to a significant portion of our society, and one that Congress can rightly deal with because in large measure Congress created it.

As I mentioned at the earlier hearing, I believe that a fair case can be made for the proposition that the original congressional purpose in enacting the Racketeer

Influenced and Corrupt Organizations Act has been distorted by recent trends in civil litigation. To the extent that that is true, the bill introduced by Senator Hatch, S. 1521, seems to bring a needed dose of sensibility to the issue.

By requiring that the prohibited conduct of a "pattern of racketeering activity" involve at least one act of racketeering activity other than the garden variety acts of mail, wire or security fraud, the statute would once again reach conduct that is actually racketeer influenced.

I believe that that is a more reasonable approach to the problem originally addressed by Congress, for if the long arm of Federal jurisdiction, and the heavy burden of treble damages, attorney fees and a besmirched reputation are to be lowered on businesses and individuals alike, it ought to follow from something other than the misuse of the mail or telephones in futherance of fraudulent transactions. It certainly ought to follow from something more onerous than securities fraud, which can result from a mere failure to disclose certain information.

I look forward to the testimony of the witnesses. Thank you, Mr. Chairman.

Senator HATCH. Our first panel consists of Mr. Richard Swanson from the Committee on Federal Legislation of the New York State Bar Association, from New York, New York; John Marshall Finch, Esq., of Arthur Young & Co., from Washington, DC, and he will be testifying on behalf of the National Association of Manufacturers; Mr. Edward I. O'Brien, president of the Securities Industry Association here in Washington, DC; and Mr. Donald E. Egan, Esq., of the law firm of Katten, Muchin, Zavis, Pearl & Galler. They are the counsel of record in the Supreme Court *Haroco* decision, and it is very important to have Mr. Egan here.

We are grateful to have you here and welcome you to the committee. We look forward to hearing from you and learning what we can in the 5 minutes allotted. I am going to limit your time so I can have some time to ask some questions to each of you.

We will start with you first, Mr. Swanson, then Mr. Finch, Mr. O'Brien, and finally Mr. Egan.

STATEMENT OF A PANEL CONSISTING OF: RICHARD P. SWANSON, COMMITTEE ON FEDERAL LEGISLATION, NEW YORK STATE BAR ASSOCIATION, NEW YORK, NY; JOHN MARSHALL FINCH, ARTHUR YOUNG & CO., WASHINGTON, DC, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; EDWARD I. O'BRIEN, PRESIDENT, SECURITIES INDUSTRY ASSOCIATION, WASHINGTON, DC; AND DONALD E. EGAN, KATTEN, MUCHIN, ZAVIS, PEARL & GALLER, CHICAGO, IL

Mr. SWANSON. Thank you, Mr. Senator. Mr. Senator and members of the committee, my name is Richard Swanson and I am with the Committee on Federal Legislation of the New York State Bar Association. I am here today with Mr. Stephen Camhi, the committee's chair, and Mr. Steven Edwards and Mr. Robert Swidler who are members of the committee who participated in drafting our report on civil RICO. We thank you for the opportunity to comment on RICO's civil remedy provisions.

Our committee, Mr. Senator, is comprised of lawyers from throughout New York State. Many of us have had experience with civil RICO cases on both the plaintiff's and the defendant's side. I myself have been involved in six civil RICO actions during the past 3 years, split exactly evenly between plaintiff's cases and defendant's cases, and so my attitudes concerning civil RICO have not been shaped by the nature of the clients whom I represent.

The members of our committee, like myself, unanimously agree that something must be done to change the civil remedy provisions of RICO. To that end, our committee has prepared a report which recommends that a criminal conviction requirement be added to all civil RICO actions based on mail fraud, wire fraud or securities fraud.

The basic problem with RICO's civil provisions, as we see it, is that they allow the assertion in Federal court of large numbers of in terrorem treble damage racketeering claims in what would otherwise be routine commercial or securities disputes by allowing a treble damage remedy to any person injured in his business or property by reason of the conduct of an enterprise through a pattern of racketeering activity and by defining a pattern of racketeering activity to require only two acts of mail fraud, wire fraud or securities fraud—statutes which have themselves been very broadly construed.

RICO allows virtually any common law fraud or securities dispute to be pleaded as a treble damage claim in Federal court. This broad but literal interpretation of RICO was encouraged by the broad interpretation of RICO's criminal provisions given by the courts which construed RICO's criminal side, and was recently reinforced, as you pointed out in your opening remarks, by the Supreme Court's *Sedima* and *Haroco* decisions.

This creates a situation with enormous policy implications which we do not believe Congress ever considered back in 1970 in passing RICO. First, most, if not all, common law fraud claims can, and probably will, be brought in Federal court, increasing the already heavy Federal judicial docket and revising the traditional relationship between the Federal and State judiciaries.

Second, most, if not all, common law fraud claims can, and probably will, give rise to automatic treble damages and an award of attorney's fees.

Third, most, if not all, securities fraud claims can, and probably will, give rise to automatic treble damages and an award of attorney's fees, even though Congress did not take that approach when it passed the securities laws.

Finally, businessmen and professionals whom one would not ordinarily associate with organized crime are labeled as racketeers, we think unfairly, placing them in the same category as narcotics dealers and members of organized crime.

Did Congress really intend these consequences when it passed the RICO legislation in 1970? Most courts that have looked at the question do not think so, and the Supreme Court, of course, disagreed in the *Sedima* and *Haroco* cases, which we believe necessitates a response from the Congress.

That is why we are here today and our task essentially involves two questions. First, should civil RICO have the coverage that the broad language in the statute apparently gives it? Second, if not, how should it be limited?

Our committee believes that the answer to the first question is no. There are, and there have always been, remedies for common law fraud and securities fraud. There is no evidence whatsoever that those remedies are inadequate. There is no evidence of an epidemic of fraud in the last 20 years that would necessitate the broad, new remedies which RICO provides. So our committee does not believe there is any compelling need to expand the remedies for common law fraud or securities fraud.

Which brings us to the second question: How should RICO be limited? How do you restructure RICO's civil remedies so that they do not apply to business torts, but still work effectively against racketeers? Our proposed solution is to amend the civil remedy provisions of RICO to require a prior criminal conviction in, and only in, the case of mail fraud, wire fraud and securities fraud.

This approach has several advantages, we believe. First, it eliminates the largest number of cases in which civil RICO has been asserted in the commercial context. Second, it does so in a way which is simple and, we believe, easy to apply. Third, it leaves the vast bulk of the statute intact and will not preclude civil suits against racketeers, as that term is commonly understood.

We also recognize that our proposal is not a perfect one and we also recognize that it is a different proposal than the one which you, Senator Hatch, have introduced in your recent bill. We also recognize that our proposal is subject to certain potential criticisms.

For example, there may be a racketeer who commits mail fraud, wire fraud, or securities fraud, and who, for some reason, is not prosecuted by the Government and therefore is not subject to civil RICO liability.

Senator HATCH. You are really quite close to, S. 1521, though.

Mr. SWANSON. I am sorry, Mr. Senator.

Senator HATCH. You are really quite close to our suggestion.

Mr. SWANSON. That is correct; that is absolutely correct, Mr. Senator.

That person, such as the person you provided an example for, will be subject to other kinds of civil liabilities which can include the potentiality for punitive damages. We just do not believe, Mr. Senator, that RICO has been used in the vast bulk of cases against true racketeers. We believe that it has been asserted almost exclusively in the commercial context and, we believe, improperly.

Therefore, we urge the adoption by the U.S. Congress of the particular proposal which our committee has recommended, that of adding a criminal conviction requirement for mail fraud, wire fraud, and securities fraud.

[The statement follows:]

STATEMENT BY STEPHEN B. CAMHI, STEVEN M. EDWARDS AND RICHARD P. SWANSON OF THE COMMITTEE ON FEDERAL LEGISLATION OF THE NEW YORK STATE BAR ASSOCIATION

Before The

SENATE COMMITTEE ON THE JUDICIARY

ON THE CIVIL REMEDY PROVISIONS
OF THE RACKETEER INFLUENCED
AND CORRUPT ORGANIZATIONS ACT

September 24, 1985

Mr. Chairman and the Members of the Committee:

On behalf of the Committee on Federal Legislation of the New York State Bar Association, we thank you for the opportunity to comment on the civil remedy provisions of the Racketeer Influenced and Corrupt Organization Act ("RICO").

Our Committee is comprised of a group of practitioners engaged in private practice throughout New York State. Many of us have had experience with RICO on both the plaintiffs' and defendants' sides. All of us agree that something must be done to change the civil remedy provisions of RICO.

To that end, the Committee has spent the past year investigating and evaluating RICO's civil remedy provisions. We have prepared a report which recommends that a "criminal conviction" requirement be added to all civil RICO actions which are based on mail fraud, wire fraud and securities fraud. A copy of our report is attached.

The basic problem presented by RICO's civil provisions is that they allow the assertion, in federal court, of large numbers of treble damage "racketeering" claims in what would otherwise be routine commercial cases. By making a treble damage remedy available to "any person injured in his business or property by reason of" the conduct of an "enterprise" through a "pattern of racketeering activity", and by defining a "pattern of racketeering activity" to require only two acts of mail, wire or securities fraud, RICO allows virtually any common law fraud or securities law claim to be pleaded as a treble damage "racketeering" case in federal court. Moreover, many attorneys feel ethically obligated to take that approach since it increases their clients' leverage, particularly in settlement negotiations.

This creates a situation with enormous policy implications, which we do not believe Congress ever considered:

(1) Most, if not all, common law fraud claims can (and probably will) be brought in federal court.

(2) Most, if not all, common law fraud claims can (and probably will) give rise to automatic treble damages and an award of attorney's fees.

(3) Most, if not all, securities fraud claims can (and probably will) give rise to automatic treble damages and an award of attorney's fees, even though Congress did not take that approach when it passed the securities laws.

(4) Businessmen and professionals whom one would NOT ordinarily associate with organized crime are labeled as "racketeers", placing them in the same category as narcotics dealers and members of organized crime.

Did Congress really intend to do this when it passed the RICO legislation in 1970? Most courts that have looked at that question believe it did not, and they have fashioned a series of patchwork limitations designed to restrict the scope of RICO. The Supreme Court, however, recently reviewed some of those limitations in *Sedima* and *Haroco* and rejected them, holding that the statute says what it says and can only be changed by Congress.

That is why we are here today, and our task essentially involves two questions: (1) Should civil RICO have the coverage that the broad language in the statute apparently gives it? (2) If not, how should it be limited?

Our Committee believes that the answer to the first question is no. There are, and have always been, remedies for common law fraud and securities fraud. There is no evidence that these remedies have been inadequate. There is no evidence of an epidemic of common law fraud and securities fraud in the last 20 years. It should be emphasized that most of the civil RICO cases in these areas have involved complicated business transactions, where the parties to the transaction are wealthy and sophisticated, and the alleged fraud is an ancillary aspect of what would otherwise be a legitimate transaction.

So our Committee does not believe that there is any compelling need to expand the remedies for common law fraud and securities fraud.

That brings us to the second question, which is how should RICO be limited? It is here that our Committee grappled with what we called "the baby with the bathwater problem". How do you restructure the civil remedies so that they do not apply to business torts but still work effectively against racketeers? Practically every solution that the lower courts and other commentators have devised has been clumsy, unintelligible and overinclusive. There is no reason why civil RICO should be completely eliminated; there is no way of differentiating a "racketeering injury" from a "nonracketeering injury"; and there is no reason why a prior criminal conviction should be required before an injured party can obtain a federal treble damage remedy for arson or murder.

Our proposed solution is to amend that civil remedy provision of the statute to require a prior criminal conviction in -- and only in -- the case of mail fraud, wire fraud and securities fraud. This approach has several advantages. First, it eliminates the largest number of cases in which civil RICO has been abused. Second, it does so in a way that is relatively simple and easy to apply. Third, it leaves the bulk of the statute intact and will not preclude civil suits against "racketeers" as that term is commonly understood.

We recognize that our proposal is not perfect. Perhaps the most obvious potential criticism of our proposal is that there may be a racketeer who commits mail fraud, wire fraud or securities fraud and who, for some reason, is not prosecuted by the government and therefore is not subject to civil RICO liability. That person, however, is still subject to common law fraud and securities fraud liability, which can (and probably will) include punitive damages. In addition, given the dearth of civil RICO cases against true "racketeers" in the past, there is no reason to believe that our proposal would actually have the effect of eliminating cases against such persons that would otherwise be brought. There is also no reason to assume that the government will not seek criminal convictions against racketeers engaged in mail fraud, wire fraud or securities fraud -- indeed, there is every reason to believe that the government will do so. Moreover, in some circumstances the racketeer may be subject to RICO liability under agency principles even where someone other than himself has been criminally convicted, if that person can be deemed to be the racketeer's agent.

On balance, therefore, we believe that our proposal is a good one, and we would be happy to answer any questions you might have.

NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON FEDERAL LEGISLATION

Proposed Modification to Civil Remedy Provisions of RICO

Introduction

The widespread use of RICO's civil provisions in ordinary civil and commercial litigation has been a matter of great concern in recent years. It seems difficult to accept the argument that Congress ever could have intended RICO to provide a treble damage remedy in a routine business or securities law case -- yet that is precisely what a literal reading of the RICO statute would suggest.

The Committee on Federal Legislation of the New York State Bar Association has considered this problem, and it is the Committee's recommendation that RICO's civil provisions be amended to require criminal convictions for the underlying "predicate acts" of mail fraud, wire fraud and securities fraud. It is the Committee's belief that such an amendment to RICO would best balance the need to provide strong civil remedies to deter the activities of organized crime while avoiding a situation in which all business torts become racketeering activities for which federal jurisdiction and treble damages are available.

I. Background -- The Statute.

RICO (the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68), added to the federal criminal code in 1970, makes it unlawful for any person employed by or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. §1962(c). The statute defines a "pattern of racketeering activity" to be at least two acts of racketeering activity within ten years of each other. 18 U.S.C. §1961(5). "Racketeering activity" in turn is defined to include offenses such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, drug dealing and obstruction of justice, as well as mail fraud (18 U.S.C. §1341), wire fraud (18 U.S.C.

§1343) and "fraud in the sale of securities." 18 U.S.C. §1961(1). RICO then goes on to provide a treble damage remedy to "any person injured in his business or property by reason of" the conduct of an enterprise through a pattern of racketeering activity. 18 U.S.C. §1965(c).

A literal reading of RICO suggests that a plaintiff who can allege he was the victim of a common law fraud perpetrated through two letters, two telephone calls or one letter and one telephone call can sue for treble damages, because he has been injured in his business or property by reason of two acts of mail or wire fraud, which constitute a pattern of racketeering activity. The temptation for plaintiffs to assert such claims in many otherwise routine commercial cases has proved irresistible.

The implication of such a literal reading of RICO is that virtually all state law fraud claims can be asserted in federal court and give rise to treble damages. Did Congress intend to change the common law so dramatically when it passed the RICO statute in 1970? The answer appears to be no, although the legislative history is ambiguous. See generally Sedima, S.P.L.R. v. Imrex Co., 741 F.2d 482, 488-94 (2d Cir. 1984), cert. granted, ___ U.S. ___, 105 S.Ct. 901 (1985).

II. The Problem.

Because a literal reading of RICO could have the effect of re-writing the traditional relationship between the federal and state judiciaries, substantially increasing the federal judiciary's docket, and allowing the assertion of large numbers of in terrorem treble damage suits in what would otherwise be ordinary civil cases, without any real evidence of an affirmative intent on the part of Congress to accomplish these goals, RICO's civil provisions have spawned great controversy. A recent compendium of RICO literature listed over 120 articles, demonstrating the attention given RICO by the commentators. "Selected Materials on the Racketeer Influenced and Corrupt

Organizations Act (RICO)", 39 Record of the Association of the Bar of the City of New York 436 (1984). Inconsistent judicial decisions have also resulted, because some courts have read RICO literally, to allow treble damage recovery in common law fraud cases (e.g., B.F. Birsch, Inc. v. Enright Refining Co., D.N.J., slip op., decided November 17, 1983), while other courts have limited RICO in various ways.

For example, some courts have suggested that criminal convictions for the underlying predicate acts are a prerequisite to a civil RICO suit. See, e.g., Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), cert. granted, ___ U.S. ___, 105 S.Ct. 901 (1985). Other courts have rejected that approach. See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1271 (7th Cir. 1983); and USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982).

Still other courts have suggested that some nexus to organized crime be demonstrated before a civil RICO claim can be asserted. See Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347 (S.D.N.Y. 1983), rev'd, 719 F.2d 5 (2d Cir. 1983); and Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983). The majority of the courts have rejected that requirement, however, first, because it does not appear in the statute, and second, because of the inherent difficulties involved in defining what constitutes "organized crime". See Moss v. Morgan Stanley Inc., 719 F.2d 5 (2d Cir. 1983); Haroco, Inc. v. American National Bank & Trust Co., slip op., No. 83-2529 (7th Cir., decided Oct. 19, 1984), cert. granted, ___ U.S. ___, 105 S.Ct. 901 (1985); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1271 (7th Cir. 1983); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 608 (1983); and Bennett v. Berg, 685 F.2d 1053 (8th Cir.), aff'd en banc, 710 F.2d 1361 (1982), cert. denied, ___ U.S. ___, 104 S.Ct. 527 (1983).

Some district courts have required a "competitive injury" under civil RICO which is an injury distinct from injury merely caused by the predicate acts and which is analogous to the competitive injury requirement in the antitrust laws. Compare North Barrington v. Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980); Crocker National Bank v. Rockwell International Corp., 555 F. Supp. 47 (N.D. Cal. 1982); and In re Longhorn Securities Litigation, 573 F. Supp. 255 (W.D. Okla. 1983); with Harper v. New Japan Securities International, Inc., 545 F. Supp. 757 (N.D. Cal. 1983); and In re Catanella and E.F. Hutton & Co., Inc. Securities Litigation, 583 F. Supp. 1388 (E.D. Pa. 1984). But the Courts of Appeals which have considered this suggestion have rejected it. See Haroco, supra; Bunker Ramo, supra; Schacht v. Brown, supra, and Bennett v. Berg, supra.

A variation on the "competitive injury" approach which has been adopted by some courts is the proposed requirement of "racketeering enterprise injury", which is also an injury distinct from injury merely caused by the predicate acts. See Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984). However, no court has suggested any workable standard or rule by which an injury caused by a predicate act might truly be distinguished from a racketeering enterprise injury, so many courts have rejected this requirement. See, e.g., Haroco, supra; Jensen v. E.F. Hutton & Co., CCH Fed. Sec. L. Rep. ¶99,674 (C.D. Cal. 1984); Ralston v. Capper, 569 F. Supp. 1575 (E.D. Mich. 1983); Yoncoski v. E.F. Hutton & Co., 581 F. Supp. 88 (E.D. Pa. 1983); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231 (S.D.N.Y. 1983); Crocker National Bank v. Rockwell International Corp., 555 F. Supp. 47 (N.D. Cal. 1983); and Kirschner v. Cable/Tel Corp., 576 F. Supp. 234 (E.D. Pa. 1983).

Another suggested limitation on civil RICO is the requirement that there be an "enterprise" which is separate and distinct from the "person". Thus, some courts suggest that a corporation at the center of a fraud cannot be both the "person" and the "enterprise" under RICO. Compare United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); with United States v. Computer Services Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983).

See also Bennett v. Berg, supra. In a civil fraud suit, however, even if this requirement were adopted, it may be avoided by characterizing the corporation and its employees involved in the alleged fraud as constituting the unlawful enterprise.

The Supreme Court has recently granted certiorari in the Sedima and Haroco cases (___U.S. ___, 105 S.Ct. 901), and therefore the Court may soon clarify some of the confusion surrounding the proper scope of civil RICO. However, in view of the depth of controversy surrounding RICO and the breadth of suggestions as to how its civil provisions should or should not be limited, it seems unlikely that the Supreme Court will be able to resolve, in two cases, all of the difficult questions which RICO raises. Moreover, since RICO is a federal statute, any Supreme Court opinion in Sedima or Haroco can be altered by Congress.

III. Summary of and Commentary on Reform Proposals.

The Committee has considered a variety of views as to whether and how to limit the private right of action provided by RICO. A summary of the major reform proposals, and the Committee's commentary on such proposals, follows.

A. Leave the statute as is. Some commentators have argued that RICO should be left alone because they believe that the extension of federal jurisdiction to a wide range of alleged business frauds is beneficial. They argue that a treble damage remedy in federal court should be available against those who are found to have committed two or more of the predicate offenses; honest business persons are adequately protected by the need to prove intent to establish such predicate offenses.

The Committee rejected this approach because it believes that the problems for legitimate business persons caused by the misuse of RICO are real and substantial. For example, the treble damages provision has encouraged the filing of strike suits which, even if ultimately dismissed, are costly to defend; the easily-made charge of "racketeering" does have an adverse effect on some defendants' businesses; the potential risk of treble damages has armed plaintiffs with a powerful new weapon in negotiating settlements; and the extension of federal jurisdiction erodes concepts of federalism.

While the courts may be on the way to solving some of these problems without legislative reform, many courts have tried to solve these problems by grafting on to the statute requirements which do not appear on its face. The Committee therefore believes that such reform is more appropriately accomplished by Congress than the courts. Congress is not limited to construing the statute's language, but may amend that language, for instance, by deleting certain predicate offenses. Congress also can more freely study and consider the policy implications of alternative reform proposals and can more easily implement comprehensive reforms on a uniform basis.

B. Eliminate Civil RICO. Some commentators have advocated abolishing civil RICO in its entirety, on the ground that it has proven to be ineffectual with respect to its original purpose: providing a weapon against, and remedy for, persons injured by organized crime. Instead, the statute has become an instrument used largely in commercial litigation. The repeal of civil RICO, it is argued, will eliminate its misuse in commercial litigation, with little impact on the fight against organized crime.

The Committee is of the view that civil RICO should remain available as a remedy against organized crime, as well as against defendants charged with other serious wrongdoing, including the predicate offenses of murder, kidnapping, arson, robbery, bribery, extortion and drug dealing, and against defendants whose conduct was proven to be sufficiently egregious that they were prosecuted and convicted for mail fraud, wire fraud or securities fraud. Legislative reform can accomplish these objectives.

C. Eliminate mail fraud, wire fraud, and securities fraud as predicate offenses. The inclusion of mail fraud and wire fraud as predicate offenses is largely responsible for the proliferation of RICO claims that would otherwise appear in state court as "garden variety" business fraud cases, or not be litigated at all. The allegation of two uses of the mail or wires in furtherance of a scheme to defraud, which presumably can be asserted in most fraud cases, is sufficient to enable a plaintiff to invoke RICO, and thereby seek treble damages in federal court. The inclusion of securities fraud as a predicate offense, also easily invoked in a business-dispute context, is particularly inappropriate in that it enables a plaintiff to circumvent the carefully-constructed civil remedies of the federal securities laws. Elimination of these three predicate offenses would in turn eliminate the most substantial areas of RICO misuse, while leaving intact a remedy against those persons committing a pattern of offenses more commonly associated with organized crime, e.g., bribery, counterfeiting, extortion, obstruction of justice or narcotics trafficking.

While mail fraud, wire fraud and securities fraud are the predicate offenses that facilitate the bulk of RICO's misuse, it is the Committee's view that eliminating these three predicate offenses entirely would be improper, because it would make RICO unavailable as a remedy for persons victimized by enterprises that have been convicted of engaging in criminally fraudulent activities. There is no reason to deprive plaintiffs of a civil RICO remedy under such circumstances. Moreover, there is no reason to eliminate mail fraud, wire fraud and securities fraud from the criminal portions of RICO, since RICO's criminal provisions apparently have not been subject to abuse. The Committee therefore has rejected this alternative.

D. Require a nexus with organized crime. It has been suggested that inasmuch as RICO was directed against "the unlawful activities of those engaged in organized crime," Pub. L. 91-452, §1, its misapplication to ordinary commercial disputes can be remedied by requiring proof of a connection between the defendant and organized crime.

The obvious problem with such a proposal is defining "organized crime" in a sufficiently precise manner to survive constitutional scrutiny. Moreover, an organized crime nexus requirement might run afoul of Supreme Court rulings against status offenses. Finally, there is no reason why RICO should not be available against certain enterprises which are not commonly regarded as part of "organized crime," but which are engaging in an organized pattern of criminal activity.

E. Require competitive injury similar to that required for antitrust laws. This proposal, based on an analogy to the antitrust laws, requires that the "injury to property" alleged under Section 1964(c) be an injury to competitive interests. Accordingly, treble damages would not be available to those who have suffered injury directly through the operation of a business through a pattern of racketeering, but only to those injured as competitors. See Schacht v. Brown, 711 F.2d 1343, 1357 (7th Cir. 1983).

The problem with this proposal is that it presumes that RICO was intended as a mere extension of the antitrust laws. The purpose of RICO, however, is different and broader. Whereas the goal of the antitrust laws is limited to preventing interference with free trade, RICO was intended to "strike . . . a mortal blow against the property interests of organized crime." See Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982) (quoting statement of Sen. Hruska at 116 Cong. Rec. 602 (1970)). Moreover, if Congress had intended RICO to be a mere extension of the antitrust laws, and to limit recovery to competitive injury, it could have amended the antitrust laws to provide remedies for competitive harm caused by racketeering infiltration. In fact, it declined to do so, leaving dormant in committee a bill which would extend the Sherman Act to cover organized crime activity. See Schacht, 711 F.2d at 1357, n.16. Instead, Congress enacted RICO as a separate tool in the fight against organized crime, clearly evincing an intent not to limit recovery to "competitive" or "antitrust" injury.

In addition, if adopted, the "competitive injury" requirement would impose the restrictive standing requirements of the antitrust laws on a RICO plaintiff. Engrafting such requirements onto RICO, in the Committee's view, might defeat claims otherwise appropriate and consistent with the aims of RICO, and exonerate certain defendants whose conduct falls squarely within the ambit and intent of the statute. For these reasons, the Committee agrees with the majority of the Courts of Appeals in rejecting the "competitive injury" limitation.

F. Require separate RICO injury. Section 1964(c), RICO's civil remedy provision, requires injury "by reason of a violation of Section 1962," which prohibits participating in an enterprise that engages in a pattern of racketeering activity. Section 1964(c) does not require injury by reason of a violation of Section 1961, which defines the underlying predicate acts of racketeering.

Some courts have read this language to require that a plaintiff "allege that he has suffered a distinct RICO injury as opposed merely to a direct injury from the underlying predicate acts." Bankers Trust Co. v. Rhoades, 741 F.2d 511, 515 (2d Cir. 1984). See also Sedima, S.P.L.R. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 901 (1985); Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408, 413 (8th Cir. 1984). Thus, a plaintiff must prove injury from "both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise." Bankers Trust, 741 F.2d at 516.

> "For example, a plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. Or, a plaintiff might be forced to incur an unwanted debt or to take on an unwanted business partner because an enterprise has placed his business in jeopardy by using felonious means to cause a number of his customers to withhold their custom. In each instance, the plaintiff would have suffered an injury to his business or property by reason of the defendants' use of a RICO enterprise and a pattern of racketeering acts; the individual racketeering acts, however, could not be said to have caused the same injury."

Id. at 517.

The problem with the "distinct RICO injury" requirement is that it would restrict civil RICO suits to such indirect and elusive injuries as those exemplified in Bankers Trust, thereby reducing the civil RICO statute to a trivial remedy, available in only a small fraction of RICO cases and dependent upon fortuitous facts. Therefore it has not been universally adopted. See Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), cert. granted, ___ U.S. ___, 105 S.Ct. 901 (1985).

Furthermore, the "distinct RICO injury" requirement appears to defy clear definition and would result in confusion and inconsistent decisions as to precisely what type of injury RICO requires. Although several courts have imposed this requirement, only the Bankers Trust court was able to provide examples of a distinct RICO injury. Even that court did not go beyond providing examples to attempt to articulate a rule which would distinguish a "distinct RICO injury", for which recovery is allowed, from other injuries, for which no RICO recovery is permitted. Imposing such a restriction therefore would not abolish any ambiguities in the statute but rather would add to them.

For these reasons, the Committee believes that Bankers Trust was erroneous when it held that the "by reason of" language of the RICO statute was meant to require indirect injury. It is more reasonable, in the Committee's view, to construe the "by reason of" language as merely imposing a proximate cause requirement on RICO plaintiffs, whereby they must allege that the predicate acts caused them injury, whether directly or indirectly.

G. Require separate racketeering enterprise. Persons who favor this proposal would require that a plaintiff prove the existence of an "enterprise" under Section 1962(c) separate and distinct from the "person." Thus, for example, a corporation at the center of a fraudulent scheme may not be both the "person" and the "enterprise." See Haroco, supra; Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984); Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408 (8th Cir. 1984); and United States v. Computer Science Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983).

While the requirement of a separate enterprise appears to be based on a clear reading of the statute, in the Committee's view, it does not go far enough to place any meaningful limitation on the broad and abusive applications of the statute's civil provisions. For example, the requirement of a separate enterprise applies only when a corporation is "merely the victim, prize or passive instrument of racketeering," but not when the corporation is "actually the direct or indirect beneficiary of the pattern of racketeering activity." Haroco, 747 F.2d at 402. Moreover, the "separate enterprise" requirement may also easily be met simply by characterizing the corporation and its employees who engaged in the acts as the enterprise.

H. Require criminal conviction. Some commentators have suggested that a prior criminal conviction be required on each of the predicate acts before a civil RICO action can be brought. Although the legislative history is silent with respect to this proposed requirement, the Second Circuit has contended that RICO was designed to provide new penalties and remedies to combat conduct which already has been found criminal:

> "Congress expected the criminality of the predicate acts to be proved before the private action went forward -- that a criminal conviction must precede a civil suit."

Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 (2d Cir. 1984), cert. granted, ___ U.S. ___ 105 S.Ct. 901 (1985).

The advantage to this proposal is that it would restrict civil RICO to proven criminal conduct and would eliminate the difficulties and potential inequities of applying a civil standard of proof to criminal conduct.

However, while the criminal conviction requirement undoubtedly would impose an effective limitation on civil RICO, it may be too far-reaching. It would preclude civil RICO actions predicated on many kinds of egregious misconduct, including misconduct ordinarily considered to constitute organized crime, and would make civil recovery entirely dependent upon a federal prosecutor's decision to bring a criminal action. Indeed, adopting the criminal conviction requirement *in toto* might be the death knell for civil RICO.

I. *Require a prior determination of liability in government civil or criminal proceeding*. This proposal would require a prior criminal conviction, as set forth in *Sedima*, *supra*, or a prior finding of civil liability in a government proceeding. The Committee rejected the broad criminal conviction requirement for the reasons described above.

Imposing a requirement of a finding of civil liability in a prior government proceeding is inappropriate for several reasons. First, such a requirement limits recovery to cases in which the government has a statutory right to bring a civil action. The correlation between alleged predicate acts and the government's right to commence a civil enforcement proceeding with respect to such acts will be inexact at best. The rare instances in which an alleged predicate act might also be the subject of a government civil enforcement proceeding will be further limited by the government's discretion not to institute such a proceeding.

Moreover, making civil RICO remedies available as a follow-up to a government civil suit might make it more difficult for the government to pursue civil enforcement actions. For example, a defendant in an SEC action might not be willing to enter into a consent decree if treble damage liability would follow as a result.

J. *Specify with greater precision the offenses that constitute racketeering activity*. One of the factors which contributes to the broad sweep and language of civil RICO is the breadth of the underlying statutes relating to the predicate offenses enumerated in Section 1961. For example, the mail and wire fraud statutes are far-reaching, thus enabling civil RICO litigants to allege that a broad range of acts constitute the requisite predicate offenses. It has been suggested, therefore, that the predicate offenses should be more precisely defined in an attempt to reduce the broad application and availability of civil RICO remedies.

This proposal, however, appears impractical and unwieldy. It would entail re-writing all of the underlying statutes which are the sources of the predicate offenses. The mail and wire fraud statutes, for example, would have to be amended, solely for the purpose of amending the entirely separate RICO statute. Not only would the task be enormous, but it would involve a total overhaul of the federal criminal code to accommodate RICO's civil provisions. Moreover, re-definition of the predicate offenses by re-writing their constituent statutes would necessarily interfere with the administration of the federal criminal laws. Such an endeavor in this Committee's view would be ill-advised.

K. Provide for single damages only. This proposal would eliminate the treble damage remedy to limit RICO's abusive use. As such, it would eradicate any special deterrent effect which RICO's treble damage remedy provides, and would effectively eliminate the need for civil RICO altogether, since RICO's civil remedy would then be duplicative of other available, single damage remedies. The only effect of a single damage civil RICO action would be to provide a federal forum for many state claims.

This Committee believes that the legitimate aims of RICO are greater than merely providing a federal forum. The treble damage remedy provides a deterrent to certain egregious forms of misconduct. Since this Committee does not endorse a wholesale elimination of civil RICO (*see* III.B, *supra*), it similarly cannot endorse a single damages provision which would result effectively in the complete elimination of civil RICO together with its deterrent effect.

L. Redefine "pattern" to encompass only more frequent criminal activity. Currently, the "pattern of racketeering activity" element of a RICO claim requires proof of only two predicate offenses. It has been suggested that redefining "pattern" to encompass a greater number of predicate offenses would help limit the reach of the statute to enterprises that are regularly engaged in criminal activity, and would make it more difficult to assert a claim against a business based upon one alleged fraudulent scheme involving two uses of the mail or telephone.

The problem with this proposal is that simply increasing the requisite number of predicate offenses would do both too much and too little. It would impair the application of RICO to organized criminal enterprises that have caused great injury, albeit by a small number of provable acts (e.g., two acts of arson or obstruction of justice). It would also fail to limit the application of RICO to "garden variety" fraud cases, since proof of many separate uses of the mail or telephone can be furnished relatively easily in most commercial cases.

M. Redefine "pattern" to mean "systematic and continuous" for mail fraud, wire fraud and securities fraud. Some persons have suggested that requiring "systematic and continuous" mail, wire or securities fraud violations before RICO could be invoked for these predicate offenses would limit the greatest area of RICO misuse: its application to "garden variety" fraud claims through the allegation of two uses of the mail or telephone in a scheme to defraud, or a fraud involving securities. The "systematic and continuous" requirement would afford judges and juries the flexibility to apply RICO to those enterprises that are regularly engaging in fraudulent schemes, and not those accused simply of one act of fraud in which two letters were mailed.

The "systematic and continuous" requirement, however, is unacceptably vague and would result in uneven, and therefore unfair, imposition of treble damage liability on a case-by-case basis. Moreover, because of its vagueness, the requirement might not dissuade plaintiffs from commencing RICO actions in "garden variety" fraud cases, on the hope that they could convince a trier of fact that the defendant's behavior was indeed "systematic and continuous." This amendment to RICO therefore might not limit its abuse in a meaningful way.

IV. The Committee's Proposal.

The Committee recommends the adoption of a proposal that would require a criminal conviction for mail fraud, wire fraud and securities fraud before a civil RICO suit may be brought based upon those predicate acts. Civil RICO suits based upon other alleged predicate acts could be brought regardless of whether or not there has been a conviction.

This proposal represents a compromise on the solution proposed by the Second Circuit in Sedima. The Second Circuit's solution in Sedima accomplishes two things: (1) it eliminates the use of RICO as a federal treble damage remedy in garden-variety fraud cases, where civil RICO cases have been subject to the most abuse; and (2) it does so with some simplicity, in contrast to certain of the other proposed solutions such as the proposal to require a separate kind of RICO injury.

The problem is that the Second Circuit's solution in Sedima goes too far. Such activities as murder, kidnapping, gambling, arson, robbery, bribery, extortion and narcotics dealing are not involved in ordinary commercial cases. They are acts which society universally condemns, and are not acts which have been involved in abusive civil litigation involving RICO. There is no need to require a prior criminal conviction in those cases and every reason to encourage private attorneys general to bring all of their resources to bear in an effort to discourage conduct of that nature, by permitting treble damage suits under RICO for all alleged predicate acts other than mail, wire and securities fraud.

The proposal to require prior criminal convictions in the cases of mail, wire or securities fraud is not a perfect solution. Undoubtedly some cases, which do not involve garden-variety business torts, but which do involve reprehensible conduct that can be characterized as mail, wire or securities fraud but not as other kinds of predicate acts, will not be addressed if this exception is created. Any criminal conviction requirement also will make some civil recoveries dependent upon discretionary government decisions whether to prosecute.

Some deserving plaintiffs therefore will be deprived of a remedy and the deterrence effect which RICO's civil provisions presently provide will be diminished somewhat. However, the Committee believes that those cases are few and far between. Moreover, in the most egregious cases, there may be a criminal conviction on which a civil suit can be brought.

Specifically, the Committee proposes that 18 U.S.C. §1964(c) be amended as follows (changes in existing statute are indicated by underscoring):

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee; provided, however, that no suit under this section may be brought where the alleged pattern of racketeering activity constitutes only mail fraud, wire fraud or fraud in the sale of securities, unless the defendant, or one of its directors, officers, employees or agents acting within the scope of his employment, has been convicted for one or more of the acts of mail fraud, wire fraud or securities fraud alleged in the civil case."

The Committee recognizes that this proposal may not be a perfect solution to all of the problems which civil RICO raises. Nor does it resolve all questions of interpretation raised by the statute, even as the Committee proposes it to be amended.* The Committee nevertheless believes that its proposal, if adopted, will reduce substantially the number of abusive, in terrorem civil RICO suits brought in ordinary commercial cases, without unduly diminishing the deterrence effect of potential treble damage liability where it is warranted. The Committee urges the adoption of the requirement of a criminal conviction as a prerequisite to the commencement of a civil RICO suit in cases where the predicate acts of racketeering

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* For example, if a criminal conviction is required for some RICO suits, does the statute of limitations begin to run when the acts which form the basis for the complaint are complete, or when a judgment of conviction has been entered? If the latter, should the statute of limitations be extended to encom-

(Footnote continued)

(Footnote continued)

pass appeals? And what happens when a defendant is convicted not under the mail, wire or securities fraud statutes, but under some other federal statute, but his conduct could have been characterized as mail, wire or securities fraud in drafting the indictment? And what if a potential criminal defendant is not convicted solely because, for example, he has been given immunity from prosecution? Also, should a civil RICO action be available against an unindicted accomplice of a person convicted of mail, wire or securities fraud?

The Committee does not believe it is necessary to address all of these issues at the present time. Rather, they can be left to case-by-case determination as they arise.

One issue which the Committee has addressed, however, is the issue of the applicability of the doctrine of respondeat superior. See Bernstein v. IDT Corp., 582 F. Supp. 1079 (D. Del. 1984). The Committee does not believe that an employer should be able to escape liability solely because it is the employee who is convicted and not the employer -- the employer, in the case of corporations, commonly escaping indictment -- so long as the employee was acting within the scope of his employment. But the conviction of an employee who is on a frolic of his own, whose conduct cannot reasonably be attributed to the employer, ought not impose liability on the employer. Whether a convicted employee was acting within the scope of his employment therefore may present issues of fact for trial in the civil case.

activity involve mail fraud, wire fraud and fraud in the sale of securities.

Dated: May 22, 1985

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION
of the
NEW YORK STATE BAR ASSOCIATION

Stephen B. Camhi, Chair

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* Members of Subcommittee who drafted the Report.

Senator HATCH. Thank you so much, Mr. Swanson.

Mr. Finch.

Mr. FINCH. Thank you, Mr. Chairman. I am appearing today as the chairman of the NAM RICO Task Force, accompanied by John Pilcher of the NAM staff. I will briefly summarize the key points in the NAM statement.

First, as you know, the Supreme Court has invited Congress to reassert its intent regarding private civil RICO actions: "This defect, if defect it is, is inherent in the statute as written and its correction must lie with Congress."

Second, the chairman of this committee, Senator Thurmond, said in a speech 6 months before the Supreme Court in *Sedima*: "The private civil RICO provisions have been interpreted and applied in ways which necessitate further congressional scrutiny."

Third, the clear congressional intent in enacting RICO in 1970 was to provide another weapon against organized crime. As the Supreme Court stated in its 1981 decision in *U.S.* v. *Turkette*: "The major purpose of title IX [RICO] is to address the infiltration of legitimate business by organized crime."

Fourth, the failure of Congress to define the target of RICO has produced confusion and abuse of legitimate business. Parenthetically, I should note that the term "legitimate business" comes from the language of the statute itself.

As Justice Marshall noted in his dissent in *Sedima*: "The central purpose that Congress sought to promote through civil RICO is now a mere footnote."

The situation today is so confused that the initial targets of RICO, the bosses of organized crime, believe that legitimate business is the target rather than the beneficiary of Federal racketeering law.

In our statement we quote from a newspaper story that recites a conversation between Mr. Gennaro Angiulo, a major figure in Boston criminal circles, and one of his aides. Mr. Angiulo, demonstrating his belief that Federal courts would rule that the law against racketeering could only be applied if suspected Mafia members infiltrated a legitimate business, not an illegitimate business, says at the end of his conversation: "I would not be in a legitimate business for all the money in the world."

This Alice-in-Wonderland situation is the result, in part, of the way that civil RICO has been used. As we note in our statement, the American Bar Association study of civil RICO actions actually filed showed that 40 percent involved allegations of securities fraud, 37 percent involved common law fraud in a commercial or business setting, 4 percent involved antitrust or unfair competition, 3 percent involved fraud not related to securities or business transactions, and only 9 percent raised allegations of criminal activity typical of organized crime.

Finally, we are convinced that abusive civil RICO suits against legitimate business will continue to proliferate unless Congress reforms the law. We show in our statement that promoters of RICO seminars for litigators anticipate this, quoting gleefully from the Supreme Court *Sedima* decision. In fact, some commentators have speculated that litigators themselves may be subject to malpractice lawsuits if they do not add RICO claims to all their commercial lawsuits.

Accordingly, in conclusion, NAM urges Congress to amend the civil RICO provisions of the Organized Crime Control Act of 1970 and supports the Justice Department position; namely, require a prior criminal conviction before a civil RICO action can be brought, except for civil actions brought by Federal and State prosecutors.

Thank you, Mr. Chairman. We look forward to working with you and your staff.

[The statement follows:]

TESTIMONY OF
JOHN MARSHALL FINCH, ESQ.
ARTHUR YOUNG & CO.

ON BEHALF OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

SEPTEMBER 24, 1985

Mr. Chairman, members of the Committee, I am John M. Finch, a member of the office of the Chairman, Arthur Young and Co., and Chairman of NAM's Subcommittee on Corporate Finance and Management and the NAM Task Force on the Racketeer Influenced and Corrupt Organizations Act (RICO). I am accompanied this morning by Mr. John H. Pilcher, Director, Corporate Finance, Management and Competition Committee of the NAM.

The National Association of Manufacturers is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ approximately 85 percent of all workers in manufacturing and produce over 80 percent of the nation's manufactured goods. The NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The NAM appreciates the opportunity to appear before the Committee today and strongly urges legislative reform of the Racketeer Influenced and Corrupt Organizations Act(RICO). NAM specifically urges the current law be clarified to limit the focus of the civil section of RICO to cases that actually involve organized criminal activity, thus halting the current use of this statute against legitimate businesspersons and corporations.

As this Committee is aware, there are currently two bills in Congress to reform the civil section of the RICO statute. Senator Hatch(R-UT) has introduced S.1521 and Representative Boucher(D-VA-9) has introduced H.R. 2943. The National Association of Manufacturers believes that both bills and their respective approaches have merit. The NAM looks forward to working with Senator Hatch and members of this Committee in furthering such proposals to reform the obviously flawed civil RICO statute.

The Supreme Court Has Invited Congress to Reassert Its Intent Regarding Private Actions Brought Under RICO.

Since the enactment of the RICO statute (1970), a number of lower federal courts have attempted to construe the language in RICO to limit the scope of private actions. Some courts construed the statute as requiring an allegation of some connection with "organized crime". Some courts required a showing of special "racketeering injuries".

Several appelate courts rejected these attempts to impose judicial litigation on the statute. The Second Circuit rejected the requirement of a link to "organized crime" in Moss v. Morgan Stanley, Inc. (1983) and the Seventh Circuit rejected the special injury requirement in Schacht v. Brown (1983).

Finally, the Supreme Court intervened to resolve conflicting interpretations between the Second and Seventh Circuit Courts of Appeal. In Sedima v. Imrex Co., Inc., the Second Circuit Court of Appeals had held that a civil RICO claim could only be brought against a defendant who had been convicted of the predicate acts underlying the RICO claim or of RICO itself and could only be brought to collect damages for a separate "racketeering injury" wholly distinct from injury arising from the predicate acts themselves. The Seventh Circuit Court of Appeals issued a decision which rejected the requirement of a separate injury. American National Bank v. Haroco, Inc.

The Supreme Court reversed and remanded in Sedima and affirmed in Haroco, on July 1, 1985. All of the Justices agreed that the current use of civil RICO provisions deviated from the 1970 Congressional intent. The majority opinion noted the "concern over the consequences of an unbridled reading of the statute" and the perception of "misuse of civil RICO."[1] The majority opinion also acknowledged that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."[2] The majority went on to concede that "private civil actions under the statute are being brought almost solely against... respected and legitimate enterprises," rather than "the archetypal, intimidating mobster."[3]

Justice Marshall, writing the dissent for four Justices, analyzed the fundamental problems posed by the abuse of civil RICO provisions in language that was not contested by the majority. He stressed that "nothing in the language of the statute or the legislative history suggests that Congress intended either the federalization of state common law or the displacement of existing federal remedy."[4] He summarized the damage done by the misuse of civil RICO provisions:

> "These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect."[5]

Justice Powell, joining in Justice Marshall's opinion, also wrote separately, noting that civil RICO provisions have been used "against legitimate businesses seeking treble damages in ordinary fraud and contract cases," and stressing that "it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result."[6]

The entire Court, therefore, agreed that the current misuse of civil RICO provisions was clearly not intended by Congress and was harmful to legitimate businesses. But the Court divided, 5 to 4, over the remedy. The minority believed that the problems raised were susceptible to cure by judicial construction of the statute, as the Second Circuit attempted in Sedima.

But the majority, adhering to the principles of strict construction, placed responsibility for solving the problem on the body that enacted the statute:

> "This defect--if defect it is-- is inherent in the statute as written, and its correction must lie with Congress."[7]

Accordingly, the NAM is here to urge this Committee to clarify and reassert its intention that private actions under RICO are to be brought against criminal organizations and not legitimate businesses.

We would add that this Committee should not do so because it must follow instructions from the Supreme Court, a co-equal branch of government, but because such a clarification has been needed for some time. The Chairman of this Committee, Senator Thurmond, stated in a speech made six months before the Supreme Court decision in Sedima:

> "While we remain undaunted in our quest to strengthen the criminal laws directed against organized crime -- and adamant in our refusal to weaken them, -- we are ever mindful of the delicate nature of the criminal law. There is a need for precision in drawing the line between activity which is criminal -- and therefore raises the specter of depriving another human being of his life, liberty, property and reputation, -- and actions which are innocent. The Supreme Court has interpreted the Constitution to prohibit criminal laws which are "overbroad" or "vague." As legislators, we acutely appreciate our responsibilities in this regard.
>
> It is for this reason that, from time to time, we encounter a need to reexamine an act, to ensure that it is being implemented according to Congressional intent. That intent may take one of two forms -- the intent of the Congress responsible for its enactment, or the intent of the current Congress in light of changing circumstances and need. Certainly, the private civil RICO provisions have been interpreted and applied in ways which necessitate further Congressional scrutiny."[8]

The Clear Congressional Intent in Enacting RICO in 1970 was to Provide Another Weapon against Organized Crime

It seems redundant to say that the Racketeer Influenced and Corrupt Organizations Act, Title IX of the Organized Crime Control Act of 1970, was intended to deal with organized crime. Redundant, perhaps, but necessary.

Paragraphs (2) and (3) of the statement of findings enumerated at the beginning of the Organized Crime Control Act of 1970 focus on the intent behind RICO, the protection of legitimate business, labor and government:

> (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation;
> (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes.[9]

This Congressional purpose was cited by the United States Supreme Court in U.S. vs Turkette:

> "....[T]he major purpose of Title IX [RICO] is to address the infiltration of legitimate business by organized crime....
>
> "As a measure to deal with the infiltration of legitimate businesses by organized crime, RICO was both preventative and remedial."[10]

What then is the "organized crime" that RICO was intended to combat? It is not defined. Attempts to define "organized crime" were rebuffed on constitutional grounds.[11]

The Failure of Congress to Define the Target of RICO Has Produced Confusion and Abuse of Legitimate Business

We have noted that both the legislative history and Supreme Court interpretation of RICO demonstrate that the purpose of the statute was to protect legitimate business from organized crime. Today, however, the situation has been so confused by imaginative counsel, and law professors, that even the bosses of organized crime believe that legitimate business is the target of federal law.

Tapes played at a trial in Boston earlier this month provide a fascinating insight into this bizarre twist. In the portion quoted in the New York Times, Mr. Gennaro J. Angiulo, is expounding on his interpretation; as the Times summarized it, "... that the Federal courts would rule that the law could only be applied if suspected Mafia members infiltrated a legitimate business, not an illegitimate business."[12] The article quotes a conversation between Mr. Angiulo and Mr. Zannino, a lieutenant in his organization:

> "Our argument is we're illegitimate business.
>
> "We're a shylock," Mr. Zannino interjected, picking up the thrust of the argument.
>
> "We are a bookmaker," Mr. Angiulo went on. "We're selling marijuana. We are illegal here, illegal there, Arsonists. We are everything."
>
> "Pimps," Mr. Zannino suggested.
>
> "So what?" Mr. Angiulo asked.
>
> "Prostitutes," Mr. Zannino said.
>
> "The law does not cover us, is that right?" Mr. Angiulo asked.
>
> "That's the argument," Mr. Zannino replied.
>
> *"I wouldn't be in a legitimate business for all the money in the world,"*[13] Mr. Angiulo concluded. (Emphasis added.)

How could we reach this "Alice In Wonderland" situation, where the Mafia thinks that federal racketeering law protects racketeers and harms legitimate business? Because that is the way the civil RICO provisions have in fact been used. The American Bar Association (ABA) Civil RICO Task Force report cites the following statistics on cases brought under civil RICO:

- o 40% involve allegations of securities fraud;
- o 37% allege common law fraud in a commercial or business setting;
- o 4% involve antitrust or unfair competition;
- o 4% involve bribery or commercial bribery;
- o 3% involve fraud not related to securities or business transactions;
- o 1% involve theft or conversion.

Only 9% dealt with allegations of criminal activity typical of organized crime: arson, bribery, commercial bribery, embezzlement, extortion, gambling, theft, political corruption.[14]

Another survey, cited by the American Institute of Certified Public Accountants (A.I.C.P.A.), found that 57% of civil RICO cases dealt with securities transactions and 38% dealt with commercial and contract disputes.[15]

Abusive RICO Suits Against Legitimate Business Will Continue to Proliferate Until Congress Reforms the Law

The ABA RICO Task Force found that "RICO litigation has increased manifold in the 1980's. Of approximately 270 trial court decisions in the database, three percent were decided before 1980, two percent in 1980, seven percent in 1981, 13 percent in 1982, 33 percent in 1983 and 43 percent in 1984."[16] It is the view of NAM that this recorded increase is just the tip of the iceberg; hundreds more have most likely been settled during and prior to litigation.

The increase in RICO cases has been curtailed somewhat by the uncertainty of the statutes breadth and the mentioned attempts by federal courts to define a reasonable limit to the statute. With the Sedima decision, major uncertainties have now been cleared up and the legal community has been quick to act. Seminars are being prepared across the country to help private litigators gear up to the new litigation opportunities against legitimate business.

One prominent series of seminars is being prepared by Legal Times and Law & Business, Inc./Harcourt Brace Jovanovich, Publishers. Their national advertisement has the headline "Civil Rico Litigation. Expanding Applications in Commercial , Business & Securities Cases."[17] The first two paragraphs summarize for attorneys what RICO will do for their law practices.

> Two long-awaited U.S. Supreme Court decisions have clarified the meaning of the Racketeer Influenced and Corrupt Organizations statute ("RICO"). As a result, civil RICO claims in commercial and securities fraud cases are expected to proliferate.
>
> In essence, for the first time there is a federal commmercial fraud statute-RICO-that cuts across the entire spectrum of civil matters and provides treble damage remedies and attorney's fees. Consequently, RICO is likely to be a growing, and prominent feature of the commercial dispute landscape in cases ranging from corporate takeovers to loan defaults."[18]

Another RICO seminar has been planned by The American Law Institute-American Bar Association (ALI-ABA) Committee on Continuing Professional Education for October 10. This RICO program will originate live from Washington D.C., and be transmitted simultaneously via satellite to 37 cities nationwide. The advertisements for this program promote this new legal opportunity by quoting directly from Justice Marshall's dissenting opinion in the Sedima decision.[19] Justice Marshall states that the majority's interpretation of the RICO statute,

> "...simply revolutionizes private civil litigation; it validates the federalization of broad areas of state common law of frauds and it approves the displacement of well established federal remedial provisions...Civil RICO has brought profound changes to our legal landscape.[20]"

The ALI-ABA advertisement continues to quote Justice Marshall's dissenting statements that RICO will "... bring about dramatic changes in the nature of commercial litigation." and a "...radical alternation of federal civil litigation".[21]

The ALI-ABA advertisment also reports this important update on RICO litigation.

> "Within days after the decision (Sedima), plaintiffs' counsel have moved to amend a significant number of pending federal civil cases to add RICO claims".[22]

The future proliferation and misuse by private litigators in commercial disputes, of a civil procedures designed to help "eradicate"[23] organized crime, is of the greatest concern to the National Association of Manufacturers and many other business groups.

NAM Supports the Justice Department Position

It is significant that the Department of Justice has also added its voice to the widespread calling for reform of the civil section of the RICO statute. Mr. John C. Keeney, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, testified before the House Judiciary Subcommittee on Criminal Justice, September 18. During oral testimony he stated that the Justice Department could support H.R.2943 which requires "prior criminal conviction" to trigger the civil section of the RICO statute if the federal and state prosecutors were exempt from the reform. He also gave Justice Department support for the general elimination of treble damages and attorney fees under the RICO civil section, with the same exemption requirement for the federal and state governments.[24]

NAM is in agreement with the Justice Department's support for requiring reform of the civil section of RICO. NAM believes that such reform is needed to correct the civil section abuses of RICO.

Cosmetic changes such as removing the "Racketeer" label of the statute or additions of frivolous case penalties do not address the issues or resolve the problems of the civil section of RICO.

A penalty provision for frivolous lawsuits in particular will not resolve the problems which civil RICO is causing. The abuses of RICO can now occur within the letter of the law. Justice Marshall addressed this issue in his dissent.

> "In the context of civil RICO...the restraining influence of prosecutors is completely absent...[S]uch litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud..... The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the states."[25] Id. at 5041.

The Proliferation of Private RICO Civil Actions Will Create Exponential Litigation Costs to Legitimate Businesses and Society.

The RICO statute, interpretated under Sedima, is a new and potentially costly litigation procedure that will change the course of normal commercial, business and securities disputes. The potential for legal harassment in the context of business disputes will be amplified by RICO. In the future, many more regular commercial disputes which would have been brought at the state level will be filed in federal court. This jurisdictional change can be used to subject a business to a pre-trial discovery period extending over years. Greater litigation costs suffered by legitimate business's in regular commercial disputes, as a result of RICO, must ultimately be paid. Civil RICO abuses spell potential lower profits for business, or higher prices to the American consumer or both.

Congress Should Act Now to Reform and Thereby Perfect Civil Rico Provisions.

NAM strongly urges Congress to reform immediately the Civil RICO provisions along the lines suggested in S.1521 or H.R. 2943. NAM lists the reasons in support of this recommendation.

-Congress should act now to protect the victims of organized crime, originally thought to be helped in the 1970 RICO Act: legitimate business.

-Congress should act now to refocus attention on the real target of the 1970 Act: organized crime and its infiltration into legitimate business.

-Congress should act now because the Supreme Court in Sedima stated that only Congress can correct the abuse of Civil RICO.

-Congress should act to avoid the proliferation of private litigation abuses foreseen by leaders in the judicial, business and governmental sectors.

-Congress should act now because it owes a duty to the public, to acknowledge and correct a deeply flawed statute.

I appreciate the opportunity to be here today to present the views of the National Association of Manufacturers on this important public issue. Thank you.

FOOTNOTES

1 Sedima, S.P.R.L. v. Imrex Co. 53 U.S.L.W., 5034.

2 Ibid., 5039.

3 Ibid.

4 Ibid., 5041.

5 Ibid., 5045.

6 Ibid., 5047.

7 Ibid., 5039.

8 Address by Senator Strom Thurmond (R-SC), to the National Conference on Current SEC Developments of the A.I.C.P.A., Washington, D.C., January 8, 1985, page 4.

9 84 Stat. 922-923; 116 Congressional Record 602 (1970).

10 452 U.S. 576, 591 (1981).

11 See footnote 177 of the "Report of the Ad Hoc Civil RICO Task Force" of the A.B.A. Section of Corporation, Banking and Business Law, page 118.)

12 New York Times, September 8, 1985, page 26.

13 Ibid.

14 ABA Report, pages 55-56.

15 Ibid., page 56, fu. 61.

16 ABA Report, page 55.

17 Legal Times, August 5, 1985, page 9.

18 Ibid.

19 See Civil Litigation after Sedima brochure, September, The American Law Institute-American Bar Association Committee on Continuing Professional Education: VIDEO LAW REVIEW REGISTRAR, ALI-ABA, 4025 Chestnut Street, Philadelphia, PA 19104.

20 Ibid.

21 Ibid.

22 Ibid.

23 S. Rep. No. 91-617, 91st Congress, 1st Session at 2.

24 See House Judiciary Subcommittee on Criminal Justice transcripts, September 18.

25 Id. at 5041.

Senator **Hatch**. Thank you, Mr. Finch.

Mr. O'Brien.

Mr. **O'Brien**. Good morning, Mr. Chairman, Senator Grassley. I am Edward I. O'Brien, president of the Securities Industry Association. With me today is William Fitzpatrick, general counsel of the SIA, and David Hyman, of Bass Stearns, who heads up a special committee on RICO on behalf of the securities industry.

I am here this morning to urge the committee to amend the private right of action section of the RICO legislation that would really require a prior criminal conviction before the victim of the crime could pursue a private civil action. It is a simple and understandable approach to solving the problem that has developed because of the use of the civil treble damage suits against legitimate businesses.

It should be noted at the outset that there is no bona fide victim of racketeering who will be denied the opportunity to recover treble damages and attorneys' fees under the RICO Act if legislation is passed.

The proposal is one simply to modify the private right of action and not abolish it. Some of the bills which have been proposed—and I am thinking of 2943—address the concerns of the industry over the proliferation of the vexacious litigation which we have seen on a day-to-day basis.

We commend you, Senator, for your recognition of the problem in this area in sponsoring 1521, and we want very much to work with you in the development of that legislation.

The use of the private right of action section of RICO is really a recent phenomenon, and I am not going to recount all of it. We know it has happened; we know of the *Sedima* case. We have seen what has happened over the past couple of years.

Our members have indicated that the mere threat of RICO has created a dramatic change in the way litigation is managed in the firms, and this is so because many times the extortion-like threat of RICO forces settlements.

The Department of Justice, in its use of RICO in criminal prosecutions, has set up very careful guidelines requiring that RICO be selectively and carefully used. Unfortunately, plaintiffs' counsel are not subjected to the same guidelines.

The private right of action in RICO is not essential for redressing wrong, since there are ample remedies. It has been my experience, having been a securities lawyer for many years, that under the 1934 act and the 1933 act there are numerous remedies which can be drawn upon without relying upon the RICO situation.

The entire body of common law fraud and State legislative fraud really breaks down to RICO when you think about it and how it has developed over these many years since its enactment. The only restraining influence on the use of mail and wire fraud has been the use of some discretion by prosecutors, and the U.S. attorney's manual nas handled that quite well.

No matter what attorneys and judges have alleged to have been the intent of Congress when RICO was passed in 1970, common sense would indicate that it just has not worked out the right way.

Any careful analysis of the situation would show that RICO, no matter how well-intended, is creating a very bad result, and in a way it is subverting State law to an entirely different concept which was never debated, never foreseen and really does not make a great deal of sense.

In the interests of staying to your timetable, Senator, I will cut my testimony at this point and simply indicate that the claims which have been brought about saying that RICO was a good thing really do not stand examination. It just does not hold water and it has been an abuse.

The fact of the matter is, the people who have been the victims of RICO in terms of prosecution have been legitimate businesses. I do not think that is what Congress wants or intended, and I would stop at that point.

[The statement follows:]

Testimony before the
Committee on the Judiciary
United States Senate

Given by Edward I. O'Brien, President of the
Securities Industry Association
September 24, 1985

Good morning. My name is Edward I. O'Brien, and I am President of the Securities Industry Association,[1] which as you know is a trade association representing the securities and investment banking industry. In addition, prior to my becoming President of SIA I was associated for 19 years with a major nationwide registered broker dealer serving in several capacities including General Counsel and as a senior administrative executive with responsibility for a broad portion of the Company's business. I am here this morning to urge the Committee to amend the private right of action section of the Racketeer Influenced and Corrupt Organizations Act

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1/ The Securities Industry Association is the trade association representing over 500 securities firms headquartered throughout the United States and Canada. Its members include securities organizations of virtually all types--investment banks, brokers, dealers and mutual fund companies, as well as other firms functioning on the floors of the exchanges. SIA members are active in all exchange markets, in the over-the-counter market and in all phases of corporate and public finance. Collectively, they provide investors with a full spectrum of securities and investment services and account for approximately 90% of the securities business being done in North America.

(RICO). Legislation that would require a prior criminal conviction before the victim of the crime could pursue a private civil action is a simple and understandable approach to solving the problem that has developed because of the use of civil treble damage suits against legitimate businesses in ordinary commercial disputes. H.R. 2943 embodies this approach and has been endorsed by us in hearings chaired by Congressman Boucher, one of its principal sponsors.

It should be noted at the outset that no bona fide victim of racketeering will be denied an opportunity to recover treble damages and attorney fees under the RICO Act if legislation like H.R. 2943 is passed. The proposal is one simply to modify the private right of action and not abolish it. There exists precedence in both federal and state law for compensating victims of crime, and permitting them to pursue remedies against those convicted of the crime.[2/] This bill addresses the concerns of industry over the proliferation of vexatious litigation spawned by the private right of action section of RICO, while still retaining a viable civil remedy for the true victims of crime.

We commend Senator Hatch for his recognition of the enormous abuses occurring under the current private civil RICO statute and upon his introduction of S. 1521, another legislative approach to this problem. We look forward to working with this Committee and Senator Hatch in developing a formulation which adequately protects legitimate business from

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[2/] 42 U.S.C. 10601 *et seq.*; 18 U.S.C. 3671 unfounded private civil RICO suits and preserves the Justice Department's use of civil RICO against organized criminal activity.

The use of the private right of action section of RICO [Title 18, Section 1964(c)] is a rather recent phenomenon. Even though the statute dates back to 1970, there were few if any cases, prior to 1980, in which an allegation of a violation of RICO was made in civil suits. However, because of the enticement of the possibility of treble damages and the recovery of attorney fees, it is now a boilerplate allegation used in every imaginable type of civil action, particularly common ordinary commercial disputes. Although the number of decided cases has not been large, this has been due to the uncertainty of the application of the law. The most recent Supreme Court decision in the Sedima case[3/] has cleared the way for an unlimited number of such cases. Even though the number of decided cases, to date, have been few, these are but the first trickles of an onrushing flood created by the bursting of the dam as the result of the Sedima case.[4/] Our members have indicated that the mere threat of alleging RICO has created a dramatic change in the way litigation is managed by our members and that this phenomenon can in no way be

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[3/] Sedima, S.P.R.L. v. Imrex Co., Inc., et. al. _U.S. (1985).

[4/] As of March 1985 there had only been 132 published judicial RICO decisions. It is interesting to know that only three of those cases involved violent crimes. See report of the Ad hoc Civil RICO Task Force of the ABA section of Corporation Banking and Business Law at page 56 quantified. This is so because many times the extortion-like threat of the RICO allegation forces settlements of disputes prior to the filing of any complaint in a court of law. Justice Thurgood Marshall, in his dissent in Sedima, cautioned about the use of civil RICO as a means of extortion against the varied corporations RICO is meant to protect.

The Department of Justice, in its use of RICO in criminal prosecutions, has published very careful guidelines for its use.[5] These guidelines require that RICO be selectively and uniformly used.[6] Unfortunately, plaintiffs' counsel in civil RICO suits have no such guidelines. The use of the statute is indiscriminate and most certainly will not lead to any uniform development of the law. This will create an irrational pattern of case law which will not only plague our members but will also interfere with the Department of Justice in its use of RICO.

The private right of action in RICO is not essential for redressing wrongs, since there are ample remedies existing in both federal and state law to address securities violations.

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[5] The Guideline reads in part: "Despite the broad statutory language of RICO and the legislative intent that the statute "... shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute."

[6] United States Attorneys' Manual, Title 9--Criminal Division, Section 9-110.200.

Securities fraud, under the federal securities laws, is very technical in nature and, in fact, elevates ordinary contract and agency disputes between brokers and their customers into the realm of fraud.[7] Because of this, specific remedies are contained in the securities laws themselves. The non-specific generalized remedies of RICO are most certainly not needed when such specific remedies already exist under the federal securities laws. The carefully developed federal securities laws, which have been cultivated over the past fifty years, would all but be supplanted by RICO as would the entire body of common law fraud and state legislated fraud in the field of securities law.

The entire body of common law fraud and state legislated fraud succumbs to RICO because of the inclusion as predicate acts of mail and wire fraud. Congress specifically provided no private right of action for violations of mail or wire fraud because of the nebulous nature of the violation. Moreover, courts have consistently held that there is no implied federal private cause of action for victims of these federal

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7/ For example, if a registered representative, for a broker-dealer, recommends a security to a customer on the basis that it is a very conservative investment and, subsequently, the investment proves to have been highly speculative and goes bankrupt, it is not unusual for a plaintiff's attorney to file suit on the basis that the federal securities fraud laws had been violated. Absent these laws, it would ordinarily be thought that the controversy involved, at most, either a violation of contract or some failure under normal agency laws. The federal securities laws have taken such contract disputes and elevated them into the realm of fraud.

violations.[8] On the criminal side, the courts have tolerated a tremendous expansion of the use of mail and wire fraud in prosecuting criminals.[9] The only restraining influence on the use of mail and wire fraud has been the use of prosecutorial discretion. The United States Attorneys' Manual states that mail and wire fraud should only be used against substantial patterns of conduct where the scheme involved has been directed against a class of people or the general public. In all other cases, parties should be left to settle their differences by civil or criminal litigation in the state courts.[10] It does not take a terribly imaginative plaintiff to insert a claim of fraud under the very nebulous concepts of mail fraud or wire fraud. The result of this is that hundreds of years of common law interpretation of state law fraud is completely subverted to RICO. In other words, RICO has completely federalized what heretofore has been considered the province of state courts--that is the resolution of common garden variety disputes between the state's citizens. No matter what attorneys and judges have alleged to have been the intent of Congress when RICO was passed in 1970, common sense would dictate that this is not a desirable policy. If this nation is going to abandon well over 200 years of common law development by the states of what fraudulent practices are compensatable in courts, and if we are to abandon 50 years of carefully crafted federal securities laws then a serious far reaching debate on the pros and cons of such a dramatic event should take place. Certainly, no such debate took place in 1970. Any careful analysis of this situation would show that RICO, no matter how well intended, is creating a bad result in that the state common law apparatus and the federal securities law apparatus are being abandoned and replaced by such an unstructured, generalized, overly broad concept as RICO. While RICO is excellent as a criminal statute, it is a poor substitute for the careful body of law which has been developed in the area of fraud, particularly in the area of securities fraud. All this can be remedied by simply limiting private rights of actions to those instances when people have been convicted of criminal violations. Criminal actions are brought by the government under carefully articulated guidelines. Civil actions are helter skelter, and brought by people who have no concern for the development of the law, and certainly have no concern about the displacement of state courts as the proper forum for the resolution of such garden variety claims.

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[8] See Ryan v. Ohio Edison Co., 611F.2d1170 (CA6 1979) (Mail fraud); Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500F.2d634 (CA5 1974) (Wire fraud), Cert. denied, 423 U.S. 837 (1975).

[9] See United States v. Weiss 752F.2d777 (CA2 1985)

[10] United States Attorneys' Manual, section 9-43.120 (February 16, 1984)

I am aware that there has been prior testimony against passage of a bill mandating a prior criminal conviction. The arguments put forth are usually not on point and really fall into three categories. The first says that there is insufficient evidence to show that RICO is a problem. This would be analogous to the Captain of the Titanic when informed of the collision with the iceberg, and that the water had already reached the third deck opined that not until he saw his own cap floating in the water would he believe that the Titanic would sink. Even in the limited database which the ABA Ad Hoc Committee put together, it is shown that with each passing year more and more RICO cases are being decided and, most certainly, after the Sedima case the stampede will increase even more dramatically.[11/] As I testified earlier, the number of cases actually decided and the number of cases currently in court do not fully reflect the dimensions of this problem since many cases are never filed simply because of the harassing threat posed to legitimate businesses and the settlement of unfounded claims rather than experience the harassment of the suit and the torturous pre-trial discovery process which opens up a 10-year period.

Much of the testimony offered on behalf of the National Association of Attorneys General extolled the virtues of Civil RICO in combating crime. The bill, as proposed, does not deal with Civil RICO. It deals only with the private right of action section. The Attorneys General were referring to the use by government of the civil remedies such as injunctions and confiscations which the act provides. No one is questioning the utility and the effectiveness of such sections. That the federal government can use these very important tools is right and proper. SIA fully endorses the use of these weapons by the federal government and in no way wishes to see a diminution in

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[11/] See report of the Ad Hoc Civil RICO Task Force of the ABA on page 55.

these powers. The securities industry gains from a strong federal enforcement policy since it helps eliminate criminals who prey on the investing public and who diminish public confidence in our markets. It is essential though for Congress in the consideration of this problem not to confuse the two issues as apparently the states attorneys general have. This proposed bill only modifies the right of a private citizen to institute a civil action on the basis of RICO. This proposed legislation in no way diminishes the ability of the government to bring civil remedies to bear on criminals.

In fact the Department of Justice, in answering questions posed only last Wednesday in testimony before the House Subcommittee on Criminal Justice, indicated they would support a prior criminal conviction standard (H.R. 2943), if it was amended to explicitly preserve the Justice Department's right to sue on behalf of the federal government for treble damages, without first having a prior criminal conviction. We would support such an amendment to a criminal conviction standard.

The third theme that has been introduced is that the business community is somehow trying to separate itself out from its obligations to the community and be made immune from RICO. This probably has been fostered by so much misunderstanding concerning the focus of RICO and whether or not it was aimed especially and exclusively at "organized crime". I well realize that it is not possible for the Congress to create a criminal statute directed at a class of people or at a particular status. For this reason, it was necessary to draft the language in extremely broad terms so as not to encounter constitutional objections. While all this is fine in the criminal aspects of RICO, it has created unnecessary problems when we encounter the civil portions of it under the private right of action section. The prior conviction standard in no way exculpates business from the possibility of being convicted of RICO or any criminal activity. What the legislation does is to require plaintiffs in a private civil suit to use a rifle rather than a shotgun, and to focus on those who have been proven to be criminals. Unfortunately, such is not the use of RICO today as it is written and interpreted by the courts. Under the proposed amendment, any business or any so called "white collar" criminal will still be subject to RICO and if convicted of criminal activity, will be subject to a civil suit by the victims of that criminal activity. This is a far cry from current practice when legitimate businesses are being subjected to RICO claims for disputes arising out of ordinary commercial transactions. Proponents of unmodified, unrestrained use of the private right of action in RICO argue that legitimate businesses have nothing to fear since if they have done nothing criminally wrong, they will be able to prove this in court, and thereby suffer no harm from RICO. This line of reasoning exhibits a complete lack of understanding of litigation and the judicial processes as it exists today. Once a suit has been filed in court and cannot be dismissed on a preliminary motion (which will be almost impossible after the Sedima case) the defendant is then subjected to the whole panoply of pre-trial discovery. Since RICO involves at least two predicate acts within a 10-year period, this opens up that entire 10-year period to pre-trial discovery. The potential for harassment in this area is unlimited. It is quite understandable why legitimate businesses which know that if and when final decision were to be made in a trial that they would be proven innocent, settle these cases for unconscionable amounts of money rather than subject the business to the disruption of 10 years worth of pre-trial discovery.

At the time of the passage of RICO, a number of Members of the House Committee objected to the possibility of abuse of the RICO statute by arguing that it could be used "to harass innocent businessmen."[12/] Nothing could have been more prophetic. Today the private right of action section of RICO is not used against criminals or organized crime but rather against the very businesses which RICO was supposed to protect. Justice Marshall in his dissent in the Sedima case pointed out that only 9% of all Civil RICO cases have involved criminal activity associated with professional criminals.[13/] This clearly could not have been the true intention of Congress. This aberration in an otherwise well working piece of legislation can be corrected through the passage of the legislation mandating a prior criminal conviction standard. I strongly urge passage of such a bill.

[12/] H.R. Rep. No. 91-1549 at 187 (1970) [dissenting views of Reps. Conyers, Mikva, and Ryan]

[13/] Sedima SPRL v. Imrex Co., Inc., et al _U.S._ slip opinion at pg. 7 of Justice Marshall's dissent

Senator HATCH. Thank you so much. We are going to put every witness' complete statement in the record as though delivered.

Before we turn to you, Mr. Egan, let me turn to the distinguished chairman of the full committee, Senator Thurmond, who would like to put his statement in the record at this point.

The CHAIRMAN. Mr. Chairman, I want to thank you for holding this hearing. I had another hearing and could not be here, and I appreciate your taking this hearing. I ask unanimous consent that this statement appear at the beginning of the hearing.

Senator HATCH. Without objection, so ordered.

The CHAIRMAN. I will then turn it over to you. Thank you very much.

Senator HATCH. Thank you, Mr. Chairman, and we would also place in the record at this particular time the hearing statement of Senator Charles Grassley.

[The statement follows:]

OPENING STATEMENT BY SENATOR CHARLES GRASSLEY

Thank you Mr. Chairman. I want to commend you on convening this hearing on the Racketeer Influenced and Corrupt Organizations Act (RICO), and in particular its civil fraud section.

Mr. Chairman, there is no more insidious element in our modern society than organized crime. Its roots go deep into legitimate organizations and businesses as well as into criminal enterprises. Because these modern-day criminals often wear business suits and have respectable titles and organizations, the war against organized crime has often been defeated in a tangled web of legal technicalities.

Last year I chaired the Judiciary Committee's hearings on the President's Commission on Organized Crime and at that time, discussed with Judge Kaufman, the Commission's chairman, that I had seen several wars on organized crime come and go with little effect, and that I hoped that the outcome of his investigation would be more fruitful.

In order to be more effective against criminals that have invaded legitimate enterprises, the Racketeer Influenced and Corrupt Organization Act (RICO) was adopted. RICO has proven to be a useful weapon against crime. The Supreme Court made clear, in its *Sedima* decisions, that RICO could be applied to criminal associations outside of what is considered "organized crime" or the Mafia. Consequently RICO can and has been legitimately used to fight crime in so-called respectable business organizations. However, there are some instances where RICO is being used to harass and intimidate some business organizations and individuals who have committed no crime.

Consequently, I welcome this opportunity to explore ways in which Congress can clarify the law so that it is used only against criminals and their enterprises, while at the same time, not requiring such high threshholds of proof, nor such limited scope that organized crime again escapes prosecution.

Senator HATCH. We will also keep the record open for questions. Senator Grassley has some questions, and any other member of the committee who desires to submit written questions within a reasonable period of time will be allowed to do so.

Mr. Egan, we will turn to you now.

Mr. EGAN. Thank you, Mr. Chairman, and Senator Thurmond. My name is Donald E. Egan. For the record, I am a partner in the Chicago law firm of Katten, Muchin, Zavis, Pearl and Galler. As the chairman indicated, I represented the American National Bank in the *Haroco* case, which was the companion case to the *Sedima* decision which the Supreme Court recently handed down.

I have submitted a 25-page statement and it is not my intention, given the time constraints this morning, to repeat any of it. Rather, I would like to specifically direct the chairman's attention and that of the committee to the two areas in which we suggest reform is both necessary and practical.

I say practical because while I would join in many of the observations that have been made by my colleagues, and I am sure will follow and have been made in previous hearings, about the desirability of curing what I and others perceive as a very critical problem, I hesitate to go as far as some would, particularly the gentleman from New York and others, with regard to reading a criminal conviction requirement into the statute.

I do not believe that that can fairly be characterized as reform. I think that that certainly would involve a rethinking of the congressional intent underlying the original RICO statute. If Congress is inclined to do that, then so be it. I rather suspect, however, in the real world that that is not going to happen.

It is with that predicate in mind that I direct my attention to the two specific areas which I think are susceptible to reform, and reform that can be enacted.

First, the Supreme Court left open in the *Sedima* decision the definition of "pattern." "Pattern" is one of the undefined operative terms in the statute. In footnote 14, Justice White was somewhat critical of the lower Federal courts for not properly interpreting and applying the pattern requirement.

Justice Powell, in dissent, elaborated to an even greater extent, and a number of those who have appeared before you have addressed that issue.

We concur, with some modifications, in the proposal that the National Association of Attorneys General made, and that would entail a redefinition of the word "pattern" in such a fashion that the prior acts of racketeering activity are related to each other, are not isolated, and are not so closely related to each other and connected in point of time and place that they constitute a single transaction involving only one victim, not evincing continuity of activity.

In the few months that have followed *Sedima*, the courts, responding to Justice Powell's dissent and Justice White's footnote, cryptic though it may be, have done what was done previously in regard to the so-called racketeering activity issue, and that is that they have split right down the middle.

We have pointed to a number of specific examples of that in the Seventh Circuit and district courts in the Eastern District of New York and the Northern District of Illinois. It is our belief that only through legislation can clarification follow, and clarification that is sorely needed.

The other area in which we are suggesting specific reformation is in regard to 1962(c). 1962(c) is the subsection under which most of the civil RICO litigation has been brought.

It is our view that the words currently used—"conduct" and "through"—have created ambiguity and have resulted in a deluge of litigation that would not otherwise follow if this committee were to address what we believe to be the real underlying thrust of that provision.

That was not to give a civil RICO plaintiff, however meritorious his cause may be, a claim against activity that was incidental to the operation of an enterprise, but rather to a situation, such as the bank that exists because it functions solely in southern Florida to launder illegal drug money or otherwise.

It is that type of operation that the statute, in our view, is directed at, and with a modest clarification in the language I believe that that objective can be accomplished in a fashion so that the enterprise which is managed through the pattern of racketeering activity will be justifiably exposed to treble damages, and the enterprise, such as the brokerage firm or the bank or what have you, which is susceptible to incidental activity that may otherwise involve a pattern of racketeering activity would not be so affected.

I will stop there, Mr. Chairman. Thank you for your time.

[The statement follows:]

STATEMENT OF DONALD E. EGAN
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING CIVIL RICO SUITS

September 24, 1985

Mr. Chairman, Members of the Committee, I appreciate the opportunity to share my views regarding civil RICO and what I believe should be accomplished by legislative amendment.

Initially, let me say that although I represented the RICO defendant in American National Bank & Trust Company v. Haroco, 105 S.Ct. 3291 (1985), before the United States Supreme Court which was recently decided along with Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275 (1985), the views I am expressing to you today are not on behalf of the American National Bank. Rather, I am here as a private attorney, who as chairman of the litigation department of a 150-person law firm, represents individuals and corporate clients in civil litigation throughout the country in state and federal courts. I currently represent both plaintiffs and defendants in civil RICO cases. In fact, when the Supreme Court ruled against my client in Haroco, it buttressed pending RICO claims I had made on behalf of other clients who I also represent.

This seemingly inconsistent position in which I find myself in civil RICO litigation is not unique. Indeed, in light of the recent Supreme Court decisions I anticipate that most attorneys representing corporate clients will find themselves on both sides of the civil RICO fence.

My role as an advocate in the recent landmark RICO decisions, however, did provide me with the opportunity to review and study in detail the legislative history of RICO as well as virtually every district and appellate court decision interpreting or applying civil RICO. It also gave me the occasion to assess the impact of civil RICO on numerous special interest groups, many of whom have testified before this Committee.1/ It is with that background and from the perspective of a civil trial attorney that I offer what I believe are necessary reforms which this Committee should include in any amendment to the RICO statute.

Introduction

Because the Committee is by now intimately familiar with the civil RICO statute, its legislative history, and the broad interpretation given it by courts, I will not address any of

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1/ Fifteen amicus curiae briefs were filed in Sedima and Haroco including those on behalf of: (1) The American Bankers Association; (2) The American Institute of Certified Public Accountants; (3) The Securities Industry Association; (4) the States of Arizona, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming; (5) Cities of Chicago, New York and Philadelphia; and (6) The Alliance of American Insurers, The American Insurance Association, and The National Association of Independent Insurers.

those issues. Instead, I will restrict my remarks to the need for legislative reform and, in particular, two aspects of the statute which I believe stand in the greatest need of immediate remedial action by Congress and how I believe that reform can be accomplished without simultaneously weakening the statute as a vehicle to accomplish its policy objectives. Those two aspects are: (1) the "pattern" concept; and (2) defining the activity prohibited by Section 1962(c). Alternatively, I believe that eliminating mail fraud, wire fraud, and securities fraud as predicate acts for private causes of action would significantly remedy the problem. However, that solution does have the potential to eliminate legitimate claims from those RICO was intended to cover.

The Need For Legislative Reform

Several persons who have previously testified before this Committee have suggested that civil RICO is not really the nightmare for civil litigants or burden on the judiciary that others have portrayed it. For example, in the statement of the National Association Of Attorneys General and National District Attorneys Association presented on July 30, 1985 it was argued that "there is now no empirical data that shows RICO is more abused than an average cause of action" and that civil RICO suits do not "threaten unjustifiably to flood the federal courts". Similarly, rather that acknowleding the problems with the statutory language, the same group attributes any "frivolous suits brought under RICO" to "unethical attorneys". See Statement of National Association of Attorneys General and National District Attorneys Association, July 30, 1985 [hereinafter "Attorneys General Statement"] at pp. 30-31.

I submit, however, that it is not unethical attorneys who have caused the problems but the extreme breadth of the statutory language. The Supreme Court explicitly recognized this, but refused to judicially narrow the scope, concluding that that task was one for Congress:

> "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." . . .
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> It is true that civil actions under the statute are being brought almost solely against such defendants, rather than against the archtypal, intimidating mobster. Yet this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress.

105 S.Ct. at 3287, quoting, Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) (emphasis added). In fact, the Supreme Court affirmed the Seventh Circuit's holding that the plaintiff's RICO claim in Haroco was viable despite the acknowledgement by the Seventh Circuit that:

> With respect to the case before us, it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute.

Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 399 (7th Cir. 1984), aff'd, 105 S.Ct. 3291 (1985).

An attorney is not "abusing" civil RICO if he creatively applies the expansive language to circumstances which Congress did not contemplate. Rather, he is using his skills as an advocate to represent his client in the best possible manner. It is up to Congress to draft the statute so that it cannot be misapplied. Alternatively, if that is not possible the courts must interpret the statute's language so that its application does not exceed the intent of Congress. Now, because the Supreme Court has declined the opportunity to apply a judicial gloss to the words of the RICO statute in order to limit its application to its intended scope, Congress must act.

It is not simply special interest groups and attorneys who are seeking legislative reform but the federal courts as well. In its concluding paragraph in a RICO decision issued less than a month ago, the United States Court of Appeals for the Seventh Circuit exclaimed:

> We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us now.

Illinois Department of Revenue v. Phillips, No. 84-1495, slip op. at 11 (7th Cir. Aug. 27, 1985).

In Phillips, the Seventh Circuit held a RICO claim was stated by the Illinois Department of Revenue against a defendant, retailer, who filed fraudulent sales tax returns. Under Illinois law, the defendant was required to file a monthly return stating gross receipts. Because the statements allegedly understated the defendant's gross receipts and were transmitted through the mail, the Department sought treble damages under civil RICO. Like Haroco, the Seventh Circuit understandably had serious reservations about applying RICO to the facts of Phillips but felt compelled to do so since "we cannot say that it does not come within the framework of the statute." Id.

Moreover, the application of RICO to cases which it was not designed to cover is not the only reason that the judiciary and the bar have raised the distress flag. The volume and cost of civil RICO litigation is burdening and overtaxing the courts and unnecessarily increasing litigation costs to civil litigants. Professor Blakey, writing for the Association of Attorneys General, dismisses the number of RICO suits as de minimus, predicting that the number of suits will "place RICO cases well below the major areas of current federal litigation: overpayments and enforcement of judgments (41,000), prisoner petitions (26,000), social security (20,000), civil rights (20,000) and labor (11,000)." (Attorneys General Statement, pp. 30-31.) Putting aside the accuracy of the number of RICO cases Professor Blakey claims exist and the acceleration of RICO cases which will be filed in the wake of the Sedima and Haroco decisions, he argues as an academician and not as a practicing attorney or member of the judiciary, erroneously assuming that all types of cases pose equal burdens and costs to the litigants and courts.

Practicing trial attorneys and the district judges, on the other hand, would not equate the cost and time a typical civil RICO suit consumes to that of a prisoner petition or a suit for the enforcement of a judgment. Hardly a RICO complaint filed today is not the subject of a barrage of motions addressed to its sufficiency -- all of which are costly to litigants and time consuming for the judges.

Another reason legislative reform is needed is the so-called in terrorem impact of filing a civil RICO claim against a legitimate business. While I agree with the statement by Dominic Gentile, who testified here on July 31, that "[t]he mere fact that some individuals do not like to be characterized as 'corporate gangsters' should not cause Congress to throw out the baby with the bath water . . ." (Statement of Dominic Gentile, July 31, 1985, at p. 4), I believe it is equally important that one not bury one's head in the sand and ignore the fact that civil RICO claims can and do have a very real impact on settlement. As Justice Marshall aptly noted in his dissenting opinion in Sedima:

> [T]the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a "racketeer," will have a strong interest in settling the dispute.
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> * * *
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> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

105 S.Ct. at 3294-3295.

In addition to the desire to avoid the "racketeer" label and the potential exposure to treble damages, the increased costs of defending RICO litigation may prompt a settlement despite a meritorious defense. In fact, during the oral argument of Haroco the Justices suggested that, if the claims asserted against my client regarding the proper rate of interest charged on loans keyed to the prime rate are only claims for breaches of contract and not fraud as we contend, the RICO issues will never be reached. (Transcript of oral argument in American National Bank & Trust Co. v. Haroco at 17 (April 17, 1985)). What the Justices failed to recognize was that, irrespective of the merits of the RICO claim, my client must incur the costs of defending the litigation and the district court judge must expend his time and effort to dispose of the case which, absent the RICO claim, would have been filed in state court.

Another consideration which must not be overlooked in deciding whether legislative reform is necessary is the total displacement of the law of private actions under the securities laws as it has evolved. Since recovery under the securities laws is limited to actual damages hardly a securities action is filed today which does not also include a RICO claim. But as Justice Marshall observed in his dissenting opinion, even more significant than simply offering the hope of treble damages and attorneys' fees, civil RICO:

> virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws. Over the years, courts have paid close attention to matters such as standing, culpability, causation, reliance and maternability, as well as the definitions of "securities" and "fraud." . . . All of this law is now an endangered species because plaintiffs can avoid the limitations of the securities laws merely by alleging violations of other predicate acts. For example, even in cases in which the investment instrument is not a "security" covered by the federal securities laws, RICO will provide a treble damage remedy to a plaintiff who can prove the required pattern of mail or wire fraud. . . . Before RICO, of course, the plaintiff could not have recovered under federal law for the mail or wire fraud violation.

105 S.Ct. at 3295 (citations omitted). Similarly, although it is now well established that an unsuccessful bidder in a tender offer, seeking the control of a company, does not have an implied private right of action under Section 14(e) of the Securities Exchange Act of 1934,[2/] under RICO all the losing bidder need allege in order to sue the company is an injury due to a fall in the market price of the stock and two acts of mail or wire fraud.

Further, as Justice Marshall also recognized, the displacement effect of RICO is not limited to the securities laws. Rather, the "carefully crafted private damage causes of action under the Commodity Exchange Act" may also be circumvented through the use of civil RICO. Id. Hence, unless remedial steps are taken by Congress RICO may soon replace virtually every existing federal regulatory scheme insofar as private remedies are concerned.

2/ Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)

Finally, something which those who oppose a RICO amendment ignore when they argue that any change in RICO will undermine the benefits which RICO has bestowed on law enforcement agencies is that "little RICO" statutes now exist in 22 states and RICO legislation is currently pending in several others. (Attorneys General Statement, p. 4, Exhibit A). Thus, even if the opponents of any change in the federal RICO statute are correct in their claims that an amendment will lessen its availability for criminal and civil governmental prosecutions, identical provisions would still be available under state law.

In sum, I think those who suggest that the civil RICO statute does not need to be amended to prevent the continuation of its application to unintended uses do so with blinders on, ignoring the harmful effects it has had on the bench, bar, and litigants alike. As I will now discuss, amending the civil component of RICO need not undermine RICO as an effective weapon to combat organized crime. Rather, the amendment can and should limit private RICO actions to those cases which will foster the goals it was created to achieve.

Proposed Reform

As it presently exists, Section 1964 requires a civil RICO claimant to allege a violation of the substantive RICO statute, Section 1962. Section 1962 has two separate and distinct facets: (1) a pattern of racketeering activity; and (2) the use of that pattern to acquire, maintain or conduct an enterprise. It is these two facets which must be more precisely defined by legislative amendment in order to prevent the misapplication of civil RICO. Narrowly defining these component parts will not affect the criminal RICO prosecutions. Indeed, the suggested limitations on the two prongs of substantive RICO are perfectly consistent with the Justice Department's own Guidelines as to when RICO should be employed.

Defining The Pattern Requirement

The one aspect of civil RICO which the Supreme Court left open for judicial interpretation, and hence a potential narrowing of its scope, was the concept of pattern. Writing for the majority, Justice White explained that:

> The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern."

105 S. Ct. at 3287. Further, in a footnote, he points out that the statutory definition of a "pattern of racketeering activity" states that a pattern "requires at least two acts of racketeering activity" § 1961(5) (emphasis added), not that it "means" two such acts. 105 S. Ct. at 3285, n. 14. Moreover, he then proceeds to discuss the legislative history, suggesting that Congress intended pattern to include a "continuity plus relationship." Id.

In his separate dissenting opinion, Justice Powell was even more explicit in expressing his belief that the pattern concept should be narrowly interpreted, stating as follows:

> [T]he requirement in the statute of proof of a "pattern" of racketeering activity may be interpreted narrowly. Section 1961(5), defining "pattern of racketeering activity," states that such a pattern "requires at least two acts of racketeering activity." This contrasts with the definition of "racketeering activity" in § 1961(1), stating that such activity "means" any of a number of acts. The definition of "pattern" may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a "pattern" to be proved. The ABA Report concurs in this view. It argues persuasively that "[t]he 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes," ABA Report, at 72, such as the criminal acts alleged in the cases before us today.

105 S. Ct. at 3289.

Judicial interpretation of the pattern requirement, in contrast to a legislative amendment to define the term, however, is not only a lengthy endeavor, but one that is fraught with the potential for inconsistent decisions and uncertainties. Indeed, this potential has already become a reality as evidenced by the few decisions which have considered the issue subsequent to Sedima.

In the Phillips decision, for example, the Seventh Circuit gave short shrift to RICO's pattern requisite, finding that the defendant's mailing of nine fraudulent tax returns to the Illinois Department of Revenue over a nine month period "constitutes a pattern of racketeering activity as defined in the statute." Slip op. at 4. There was no discussion of whether the mailings were isolated acts or not related to a common scheme.

In contrast to Phillips, a recent opinion from the United States District Court for the Northern District of Illinois held that multiple acts, without more, are not sufficient to satisfy the pattern requirement. Northern Trust Bank/O'Hare v. Inryco, Inc., No. 84 C 2077, slip op. (N.D. Ill. July 29, 1985). In that case a defendant was charged with participating in a construction contract kickback scheme implemented through multiple payments made through the mail.

Unlike the Seventh Circuit's approach in Phillips, which did not even mention the Sedima discussion of the pattern element, Judge Milton Shadur in Inryco painstakingly analyzed the Sedima majority and dissenting opinions regarding the pattern concept, as well as earlier opinions by district and appellate courts on the issue, concluding that Sedima "creates a whole new ballgame." Slip op. at 10. Judge Shadur held that the Supreme Court's emphasis on the "continuity plus relationship" of a pattern requires more than simply two acts. Hence, the district court ruled that because the multiple mailings of the kickback checks "implemented the same fraudulent scheme . . . the single scheme does not appear to represent the necessary pattern of racketeering activity." Accord Rojas v. First Bank National Ass'n, No. 84 CV 3032, slip op. (E.D.N.Y. July 15,

1985) ("Several isolated acts, however, do not a pattern make. There must be a showing of at least two acts of racketeering activity and the threat of continuing activity. [citing Sedima] Plaintiff's allegations, arising out of the two discrete transactions with defendant, fall far short of establishing a pattern within the meaning of the RICO statute.")

On the other hand, the United States Court of Appeals for the Eighth Circuit appears to have interpreted Justice White's comments on the pattern requirement differently. Alexander Grant & Co. v. Tiffany Industries, Inc., No. 83-1608, slip op. (8th Cir. August 7, 1985). In that case the plaintiff, a public accounting firm, alleged that it was injured as a result of a pervasive scheme of mail and wire fraud designed to obtain a favorable audit. Despite the fact that the predicate acts were all designed to effectuate the same fraudulent scheme, the Eighth Circuit found the pattern requisite was satisfied in accordance with Sedima, explaining as follows:

> [W]hile Sedima emphasizes that the definition of pattern in section 1961(5) requires something more than just two acts of racketeering activity . . . the complaint in this case alleges some twenty-six acts of mail fraud and four acts of wire fraud (the amended complaint alleges forty-eight and ten acts respectively). The number and nature of the acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in Sedima that RICO not be extended to sporadic activity.

Slip op. at 2.

Thus, in only three months since Sedima was decided, courts have reached varying results as to what constitutes a pattern while professing to follow the Sedima guidelines. A legislative amendment is clearly a preferable approach. In that regard I would propose adopting a definition of pattern along the lines suggested by Justice Powell, requiring that "(i) the racketeering acts be related to each other, (ii) they be part of some common scheme, and (iii) some sort of continuity between the acts or a threat of continuing criminal activity must be shown." 105 S.Ct. at 3290, citing, Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation Banking & Business Law ["ABA Report"] at 193-208. The proposed definition offered by the National Association of Attorneys General[3/] comes very close and I would endorse it with one modification. That definition, as modified, is:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity that:
>
> (A) are related to each other[4/]

[3/] The National Association of Attorneys General credits Professor Robert Blakey with assistance in drafting its statement. (Attorneys General Statement, at 1).

[4/] In the actual definition as proposed by the Association subsection (A) would read: "are related to the affairs of enterprise." While that definition works for violations of Section 1962(c), it is not appropriate for Sections 1962(a) and (b) where the pattern of racketeering enterprise need not be related to the enterprise as discussed infra.

> (B) are not isolated; and
>
> (C) are not so closely related to each other and connected in point of time and place that, while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation, they constitute a single transaction involving only one victim not evincing continuity of activity.

(Attorneys General Statement, Exhibit E, p. 2).

Defining Section 1962(c)

As noted earlier, the substantive section of RICO, Section 1962 has, in addition to the pattern requirement, a second requirement regarding the use of that pattern to acquire,[5/] maintain,[6/] or conduct[7/] an enterprise. The mere commission of a pattern of racketeering activity, without the requisite use of that activity in relation to an enterprise, and no more, does not violate Section 1962.

In fact, it is the use of the pattern which was the focal point of Congress in enacting RICO since the objective was unquestionably to prevent infiltration of legitimate businesses and to divest organized crime of its ill-gotten gains.[8/] The Department of Justice Guidelines clearly recognize that RICO violations consist of more than just the underlying offenses. The preface to the Guidelines cautions government attorneys that:

[5/] 18 U.S.C. §1962(a).

[6/] 18 U.S.C. §1962(b).

[7/] 18 U.S.C. §1962(c).

[8/] See Russello v. United States, 104 S.Ct. 296, 303 (1983); United States v. Turkette, 452 U.S. 576, 591 (1981). See also S. Rep. No. 617, 91st Cong. 1st Sess. 76, 79 (1969).

> [A] RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances case, will not be added to an indictment unless it serves some special RICO purpose . . ."

Trade Reg. Rep. (CCH) ¶50, 452 (September 6, 1983).

Section 1962's subsections are, therefore, addressed to prohibiting economic penetration or infiltration of businesses by criminal activities. Specifically, Section 1962(a) prohibits the use of income derived from the racketeering activity or its proceeds in: (1) the acquisition of an interest in an enterprise; (2) the establishment of an enterprise; or (3) the operation of an enterprise. Section 1962(b) forbids the use of the racketeering activity, itself, as opposed to any income received therefrom, to: (1) acquire any interest in or control of an enterprise; or (2) maintain any interest in or control of an enterprise.

Section 1962(c) is aimed at the use of a pattern of racketeering activity in connection with the conduct of an enterprise's affairs, providing as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The conduct proscribed by Section 1962(c) differs from that in Sections 1962(a) and (b) in that it requires the enterprise's actual affairs be conducted through the use of the underlying criminal offenses. In contrast, Sections 1962(a) and (b) do not require that the affairs of the enterprise have any connection with the underlying criminal offenses so long as they serve as a vehicle to acquire an ownership interest or establish control in the enterprise.

The problem with Section 1962(c), therefore, is that the terms defining the prohibited relationship, "conduct" and "through" are vague and do not have statutory definitions. Using dictionary definitions,[9] it appears that Section 1962(c) prohibits a person associated with an enterprise from directing the course of or managing the affairs of the enterprise by means of the pattern of racketeering activity. Or, more simply framed, a violation of Section 1962 occurs only when the racketeering activity is being used as an integral part of the enterprise's affairs. That is not, however, how RICO is being employed. Rather, civil RICO claims are being filed where the alleged acts of racketeering are merely incidental to the enterprise. For example, in Haroco the alleged enterprise is the bank's holding company. The plaintiff has not, however, alleged that the bank conducts the affairs of its parent by virtue of the manner in which it calculates interest on certain loans which is keyed to the prime rate.

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[9] "Conduct" means "to lead," "to direct the course of, manage, control" or "to have the direction of." Webster's Heritage Dictionary, 279 (1969). "Through" is defined as "by means of" or "from beginning to end; completely, thoroughly." Webster's Third New International Dictionary, 2384 (1971); American Heritage Dictionary, 1341 (1969).

An alternative term for that of "conduct" which is less likely to cause confusion and is consistent with Congress intent is "manage". Thus, Section 1962(c) would read:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to "manage" or knowingly participate, directly or indirectly, in the "management" of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

This change would not immunize a person from civil RICO liability merely because he is not in a position of management or authority over the enterprise. If the nonmanagerial person knowingly participates in the racketeering activities which are the means by which the enterprise is being managed, he would be liable. Accordingly, this change can only serve to clarify Congress' intent and eliminate civil RICO claims in situations where there is no real threat of infiltration.

Alternatively, Mail Fraud, Wire Fraud, And Securities Fraud Should Be Eliminated As Predicate Acts For Private Actions

Much has been said about the possibility of deleting mail fraud, wire fraud, and securities fraud as predicate acts as a simple way to eliminate the great majority of civil RICO[10] and

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[10] A study of the ABA Ad Hoc Civil RICO Task Force revealed that of the 270 civil RICO cases at the trial level, 77% involved securities fraud and/or common law fraud in a commercial setting. (ABA Report at 55-56). The survey also showed that 44% of the RICO cases rely solely on allegations of mail or wire fraud with another 13% relying primarily on wire or mail fraud, but also allege another predicate offense. *Id.* at 57. Securities fraud is the sole basis of still another 35% of the civil RICO cases. *Id.*

I will not belabor the point here. That solution, however, does have at least two serious flaws.

First, its adverse effect on criminal RICO prosecutions could be substantial. See Statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, May 20, 1985, at pp. 43-45; Statement of FDIC by Daniel Persinger, May 20, 1985 at pp. 9-12; Attorneys General Statement at pp. 62-66. Hence, the predicate acts should only be deleted for civil actions, since civil litigants have not adhered to the Department of Justice Guidelines which curb the abuse of reliance on these three predicate acts for criminal RICO prosecutions.

Second, this deletion would unquestionably arbitrarily deprive some victims of a pattern of racketeering from bringing otherwise legitimate RICO claims of the type Congress intended the statute to cover. Accordingly, while the deletion of these predicate acts would effectively eliminate most of the misapplications of the civil RICO actions it would do so at the expense of others which would otherwise be proper applications.

Two of the pending bills suggest a modified deletion of these three predicate acts. Senate Bill 1521, introduced by Senator Hatch, provides that a pattern of racketeering activity for purposes of a civil claim:

> shall require that at least one act of racketeering activity shall be an act of racketeering activity other than
>
> "(i) an act indictable under section 1341 of title 18, United States Code;

> "(ii) an act indictable under section 1343 of title 18, United States Code; or
>
> "(iii) an act of which is an offense involving fraud in the sale of securities.

As a practical matter, this proposed amendment suffers from the same defects as a complete deletion of the three predicate acts since it requires another of the predicate acts to be committed in order to bring a civil claim.

Similarly, House of Representatives Bill No. 2517, introduced by Representative Conyers provides that a pattern of criminal activity:

> means two or more acts of predicate criminal activity, separate in time and place . . .
>
> (B) all of which are not violations of the same provision of law, if that provision of law is --
>
> > "(i) the second undesignated paragraph of section 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting) of this title;
> >
> > "(ii) section 1341 (relating to mail fraud) of this title; or
> >
> > "(iii) section 1342 (relating to wire fraud) of this title; and

This proposal is clearly deficient in that it would still allow a civil RICO claimant to bring an action if one of the alleged acts was mail fraud and one was wire fraud or one act was mail fraud and one securities fraud. In most commercial transactions both the mails and interstate telephone calls are typically used. Similarly, it is the rare securities fraud case which does involve the use of the mails.

Analysis Of The Pending Bills

Senate Bill No. 1521:

In addition to the modification of the predicate acts which must be alleged in a civil RICO claim, Senate Bill 1521 adds the following provision in an effort to deter misuse of civil RICO:

> (3) If the court determines that a suit brought under this subsection was frivolous and without merit, the court may, at its discretion, award the costs of the suit including reasonable attorney's fees to the defendant.[11]

As I noted earlier, I do not believe that attorneys are to blame for the extension of civil RICO suits to situations not envisioned by Congress. Indeed, they have been upheld by the courts and are more fairly attributable to the broad language of the statute.

More significantly, however, I do not believe this proposed section is necessary in light of Rule 11 of the Federal Rules of Civil Procedure which was recently amended. Indeed, as amended, Rule 11 dictates an ever stricter standard, requiring an attorney not to file any pleading unless:

> to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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[11] A similar provision is contained in the proposed amendment offered by the National Association of Attorneys General. See Attorneys General Statement Exhibit E, p. 4.

Fed. R. Civ. P. 11. Rule 11 has been effectively used against frivolous pleadings. See, e.g., Rodgers v. Lincoln Towing Service, Inc., No. 84-2823, slip op. (7th Cir. August 15, 1985); Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir. 1985). The proposed provision to civil RICO adds nothing that Rule 11 does not presently provide and, indeed, because its use of such ambiguous terms as "frivolous" and "without merit," may allow for inroads on the very exacting standard to which Rule 11 presently holds attorneys. See, e.g., In re TCS Ltd., Nos. 84-2610, 84-2655, 84-2656 (7th Cir. Aug. 1, 1985); Eastway Construction Corp. v. City, 762 F.2d 243 (2d Cir. 1985).

House of Representatives Bill No. 2517:

In addition to the proposed amendment regarding the definition of "pattern of racketeering" previously discussed, H.R. 2517: (1) provides for a new definition of "enterprise", (2) adds a new criminal provision, prohibiting "criminal syndicates," a newly defined term; and (3) changes the name of the statute.

H.R. 2517 would substitute as a definition for "enterprise" the following:

> "enterprise" means a business or other similar business-like undertaking by an association of persons, whether organized for legitimate or illegitimate purposes, and includes a government or government agency;"

The present statute reads as follows:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. §1961(4).

Ironically, the definition of "enterprise" is currently one of the few RICO concepts which is presently being interpreted by the courts on a fairly consistent basis and is no longer in a confused state. *See*, *e.g.*, *United States v. Turkette*, 452 U.S. 576, 580-81 (1981); *United States v. Ruggiero*, 754 F.2d 927, 034 n. 15 (11th Cir. 1985). Accordingly, to introduce a new definition at this time such as the one in H.R. 2517 is likely to begin anew the confusion which existed when civil RICO claims were first being filed. *See*, *e.g.*, *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated* 642 F.2d 1001 (1980), *cert. denied*, 453 U.S. 912 (1981); *United States v. Gibson*, 486 F.Supp. 1230, 1244 n. 7 (S.D.Ohio 1980). This is especially true with respect to interpreting what is meant by H.R. 2517's language, "other similar business-like undertaking."

As to the proposed addition of the new substantive offense relating to organizing, financing, controlling or participating in a "criminal syndicate,"[12] because this suggested provision appears to be directed to criminal activities I am not in a position to comment and would defer to the experts in the area of criminal law enforcement.

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[12] "Criminal syndicate" is defined in the Bill as:

> "criminal syndicate" means an enterprise of five or more persons, a significant purpose of which is to engage on a continuing basis in a pattern of criminal activity, other than a pattern of criminal activity consisting solely of conduct constituting a felony under section 1084 of this title or under the law of a State relating to engaging in a gambling business.

Similarly, as to H.R. 2517's clerical amendment to change the name of RICO to "Criminal Enterprises And Corruption Of Enterprises," I do not have a strong opinion. However, I would note that the cosmetic change of deleting the reference to "racketeer" from the statute's name will have little, if any, impact on its continued use and practical application.

House Of Representatives Bill No. 2943:

The Bill sponsored by Representative Boucher is directed solely to adding the requirement that a private civil claim under RICO cannot be brought unless the defendant was convicted of racketeering activity. Although this Bill would, in one fell swoop, eliminate all of the existing uncertainties about the appropriate applications of civil RICO, it would also effectively emasculate the purpose for which the private remedy provision was intended -- i.e., so that injured citizens could assist the criminal and governmental civil enforcement of RICO by acting as private attorneys general. Enough has been said and written about this issue, however, that it is unnecessary to burden the record with further comments.

Conclusion

In conclusion, I would urge you to promptly undertake the necessary reforms to remedy the problems which have been caused by civil RICO statute. Expeditious action in my view is essential in light of the increasing volume of RICO lawsuits precipitated by the now clear judicial mandate that the statute must be read broadly.

Thank you for allowing me the opportunity to present my views.

Senator HATCH. Thank you.

I do have some questions. Let me just mention a few examples of why I think this statute has exceeded its original purpose. I do not think Congress intended to create a Federal cause of action for marital disputes, but in a 1982 Pennsylvania case a divorced wife sued her ex-husband as a racketeer under the mail fraud statute because he had failed to keep his part of the divorce settlement. That shows how bizarre this has become.

I do not think Congress meant to create a Federal cause of action for religious disputes, but in 1982, in a Massachusetts case, a former church member sued the scientologists for fraudulently inducing her to join that particular church.

In a 1983 New York case, a dispute over who should become the next leader of a Jewish congregation became a Federal fraud case.

These are only a few examples of how the civil RICO suit is not used on racketeers at all, but as a catch-all form of Federal jurisdiction, which makes me worry about its extensive reach.

Each of you has made very important points. Let me just ask the question—we will go right across the board—will reform of the civil RICO provisions in the manner prescribed by S. 1521 and the legislation before the House hinder fraud and white-collar crime prosecutions?

Mr. Swanson, we will start with you.

Mr. SWANSON. Well, I do not think it will hinder prosecutions of any kind of white-collar fraud, Mr. Senator, because the mail fraud and wire fraud statutes in place in the Federal Criminal Code, title 18, will remain in place.

Modifying any kind of civil RICO remedy will not have any impact on the ability of any U.S. attorney to bring any prosecution whatsoever that he deems to be necessary and appropriate and in accordance with prosecutorial guidelines.

Senator HATCH. Do you feel the same way, Mr. Finch, or do you have anything else to add?

Mr. FINCH. Senator, not only do I feel the same way, but I think some of the critics of the proposal to require a prior criminal conviction raise the chimera of a chilling effect on plea-bargaining.

I would counter that any white-collar defense attorney today who does not realize that a guilty plea to mail, wire or securities fraud may bring in its train a civil RICO suit for treble damages ought to be sued for malpratice under civil RICO.

Under current law you have the liability and therefore, I do not think there is an additional burden imposed by adopting the amendment.

Senator HATCH. Mr. O'Brien?

Mr. O'BRIEN. I would agree with that, Senator. I do not think that you are going to have an inhibition against getting after people who should be gotten after. The fact is that there are numerous remedies which exist apart from this, have for a long time, and we really should not neglect them. So I feel as you suggested a few moments ago.

Senator HATCH. Mr. Egan?

Mr. EGAN. I would agree.

Senator HATCH. Civil RICO litigation has mushroomed in recent years. Forty-three percent of all civil RICO suits filed in the 15 years of the statute's existence were filed just last year, in 1984.

Now, this fact suggests that we have not yet seen all of the innovative uses which may be made of civil RICO by designing or creative litigators. What do you anticipate is the long-term potential for creative application of civil RICO beyond the original intent of Congress?

Mr. Swanson?

Mr. SWANSON. Well, Mr. Senator, the sky is the limit as far as creative lawyering goes. We are all taught in law school, all of us here at this table being lawyers, I believe, that creativity in lawyering is something to be admired.

I find it hard to sit here today and to imagine all of the creative uses to which civil RICO could be put. Any time you have a broad mail fraud, wire fraud or securities fraud statute, and then define "pattern of racketeering activity" in a manner which enables you to take those statutes and incorporate them into civil RICO, there are going to be many, many thousands of creative plaintiffs' lawyers who will be able to bring all kinds of civil RICO suits in the future that we just cannot begin to imagine today.

The three cases that you yourself just outlined a few moments ago are examples of that kind of creative RICO lawyering that I do not think Congress intended in 1970.

Senator HATCH. Mr. Finch?

Mr. FINCH. Senator, I agree. In speaking for the National Association of Manufacturers, we have two primary concerns. First, it will revolutionize the law in product liability, it will federalize the law on product liability, and it will inundate Federal courts with lawsuits regarding product liability.

Second, most of our members are public companies that issue securities and civil RICO suits have already begun to revolutionize the law in alleged securities fraud. We would foresee nothing but an exponential escalation of that kind of litigation in Federal court.

Senator HATCH. Mr. O'Brien?

Mr. O'BRIEN. Senator, down through the years I have been involved with various securities cases under the 1933 and the 1934 act. It was to my amazement when I found out a year or two ago, three years ago, what was happening in the RICO field, and looked into it and was simply astounded.

It has been applied in ways I never could have foreseen and it has really taken away from the basic legal structure for securities fraud. I think that is a mistake. Also, I happened to hear Mr. Finch and saw a brochure in which lawyers are being taught how to handle RICO cases.

There is something radically wrong with that when they are being taught how to foment litigation in this fashion, so only the Lord knows what creativity will develop here.

Senator HATCH. Thank you.

Mr. Egan?

Mr. EGAN. I would concur in the views of my colleagues. I think if RICO can be extended to domestic relations, there is realistically no limit on the upside.

Senator **Hatch**. Mr. O'Brien, as a securities law expert, you know that some have asserted that civil RICO has replaced Federal securities laws. Do yo agree with that statement?

Mr. **O'Brien**. I think that to some degree it has supplanted it, or at least efforts are being made to supplant it. But, actually, it is a mistake. There are excellent remedies under the Federal securities laws, and I am not only simply talking about that, but even in the arbitration system as well as the systems within firms themselves for reconciling disputes. So I think that it has had an unfortunate effect.

In terms of settling cases, it puts an entirely different dimension on the settlement process, escalating the amount of money out of all proportion to what is reasonable.

Senator **Hatch**. Thank you. We appreciate the testimony you have brought to us this morning. I want to thank each of you for being here.

Mr. **Finch**. Thank you, Mr. Chairman.

Mr. **Swanson**. Thank you, Mr. Senator.

Mr. **O'Brien**. Thank you.

Senator **Hatch**. Our second panel will involve the Honorable Earl Silbert, who is with the Association of Former U.S. Attorneys here in Washington, DC; Michael A. Bertz, Esq., of Los Angeles, CA; and Daniel H. Bookin, Esq., Farella, Braun & Martel, in San Francisco, CA.

We are happy to welcome you gentlemen with us and we look forward to taking your testimony right now and going from there. We will start with Mr. Silbert first, then Mr. Bertz, and then finally Mr. Bookin. Again, I would like you to limit yourselves to 5 minutes so we have some time for questions and so I can complete the schedule I have to meet today.

STATEMENT OF A PANEL CONSISTING OF: EARL J. SILBERT, NATIONAL ASSOCIATION OF FORMER U.S. ATTORNEYS, WASHINGTON, DC; MICHAEL A. BERTZ, LOS ANGELES, CA; AND DANIEL H. BOOKIN, FARELLA, BRAUN & MARTEL, SAN FRANCISCO, CA

Mr. **Silbert**. Thank you, Senator. My name is Earl Silbert, and with me is Brian Gettings, who is a member of our organization and a member of its board of directors. We are here representing the National Association of Former U.S. Attorneys, many of whom, in their role as prosecutors, served in the capacity to bring RICO actions shortly after RICO was first enacted, and a number of whom, now in private practice, have been on the other side of the table.

In addition, since most of our membership is currently in the private practice of law, a considerable portion have been involved in civil RICO litigation representing both plaintiffs and defendants.

Perhaps the most helpful specific factual item we could provide and have attempted to provide to this committee was the result of a poll that our organization took of its members. The results are set forth in the statement that we submitted to this committee.

In response to a very simplified questionnaire as to whether our members favored retention of civil RICO, whether they favored its repeal or a more restricted version, about one-third favored retention, about 20 percent favored outright repeal, and 40 out of 90, approximately, favored its retention with modifications.

Senator HATCH. Sixty-one percent did favor some reform, although 32 of the 93 members, about one-third, favored retention of the civil RICO standards exactly as they are?

Mr. SILBERT. That is right. The results could be argued really on both sides, Senator, as you have just aptly noted.

Senator HATCH. Sure.

Mr. SILBERT. The views, frankly, of our organization do vary widely, and therefore we are not in a position to make specific recommendations with particular language as to the various provisions. We can make some overall comments which we hope will be useful to the members of this committee.

We do not, as a whole, favor elimination of fraud entirely as a predicate offense for the reason that fraud can be a most serious offense causing great harm to its victims—a harm commensurate to other of the predicate offenses that are listed in the statute.

We also do not favor the requirement that before civil RICO may be utilized, there be a requirement of a prior conviction. We do not think the rights of a civil litigant should depend necessarily on how any particular prosecutor seeks to utilize his or her limited resources.

We do agree, however, that there are areas for improvement and would recommend them for the consideration of this committee. One of those has already been brought forth before this committee, and that has to do with the definition of pattern of racketeering activity.

There has been a widespread fear or concern that two comparatively isolated acts can constitute a pattern. That does not seem, as the Supreme Court suggested, to suggest or establish a pattern of activity.

Rather than to permit that to await the development of the case law over a number of years as the courts struggle to come up with a definition, we believe that it would be most helpful to the bar and to the community if specific statutory language were adopted.

We are also concerned that while we do not favor the outright elimination of fraud, we note that there have been abuses in the use of fraud as a predicate offense. Some of them have already been brought to your attention. Senator, you have mentioned some yourself this morning.

We agree that RICO was not intended to federalize common law fraud. But because we do believe that fraud can constitute a legitimate predicate offense for RICO, we believe that some creative lawyering in a sense, not by the litigation bar but by the legislators, can come up with definitions that would restrict or appear to restrict the application of RICO to those situations where there does seem to be a pattern of activity by a group of people participating in a criminal enterprise, and we would so recommend to you for your consideration.

Finally, Mr. Chairman, we see no use in the retention of the word "racketeering" in the statute. It causes a lot of problems; it does not provide any service that is necessary and its elimination will not cause any harm that we see.

[The statement follows:]

STATEMENT OF NATIONAL ASSOCIATION OF FORMER UNITED STATES ATTORNEYS

Mr. Chairman and Members of the Committee, it is a pleasure to appear before this Committee to discuss the views of the National Association of Former United States Attorneys ("NAFUSA") on civil RICO suits brought under 18 U.S. Code 1964(c). My name is Earl J. Silbert, President of NAFUSA. With me is Brian P. Gettings, Esq. a member of our Board of Directors.

Before turning to the subject of civil RICO, it may be helpful to describe briefly NAFUSA. The organization has a membership of nearly 250 persons. The bulk of the membership, as the name suggests, includes persons who served as United States Attorneys. We also include in our membership some former top officials in the Department of Justice, including Deputy Attorneys General and Assistant Attorneys General. The organization is strictly bipartisan -- the membership consists of appointees from both Democratic and Republican administrations. The membership includes persons who served as United States Attorneys as many as twenty-five to thirty years ago, although the bulk of our membership served in the late 1960's, the 1970's, and the early part of this decade. The former United States Attorneys served in jurisdictions throughout the country, in districts some of which were urban, others suburban, and others rural or a combination of the three.

Although a portion of our membership has continued or returned to public life, the majority of our membership is in the private practice of law. Many have thus represented both the Government and defendants in criminal RICO prosecutions and represented plaintiffs and/or defendants in civil RICO litigation.

In anticipation of presenting NAFUSA's views on civil RICO before the Congress, our organization conducted a poll of its members. They were asked whether they favored retention of the civil RICO law as it is, whether they favored repeal of civil

RICO, or whether they favored a more restrictive statute for civil RICO. More than one-third of our members responded to the poll. Their views reflect the significant controversy that surrounds civil RICO.

Thirty-two of the ninety-three members who responded, about one-third, favored retention of the civil RICO statute as it is. Twenty favored repeal, and forty-one favored a more restrictive statute. Because the poll did not explore the manner in which the civil RICO statute should be restricted, its results may be cited by both supporters and critics of civil RICO. Critics may point to the fact that only one-third favored the retention of civil RICO as it now stands whereas two-thirds favored either repeal or a more restrictive statute. Supporters of RICO can argue that only slightly more than 20% favored repeal of the statute, whereas nearly 80% favored retention of the statute, either as it is or on a more restrictive basis.

It is not surprising that civil RICO has engendered widely divergent views on its merits. Indeed, the same is true of the criminal RICO statute. RICO's provisions for criminal and civil sanctions against those who engage in a pattern of racketeering activity serve an appropriate remedial purpose. Its broad language with its extremely severe sanctions, however, is subject to abuse. For example, because its language permits its potential use in nearly every alleged securities, mail, or wire fraud case, the threat of RICO's inclusion in a prospective indictment is too frequently suggested, directly or indirectly, by prosecutors as a reason for a subject of an investigation to plead guilty to the underlying securities, mail, or wire fraud.

We have reviewed the three pending bills which relate to civil RICO, S.1521, H.R.2517 and H.R. 2943. We have also reviewed the recommendations proferred by the two committees of the American Bar Association (ABA) -- the Committee on RICO of the Criminal Justice Section and the Ad Hoc Civil RICO Task

Force of the Corporation, Banking and Business Law Section. In addition we are mindful of the position of the United States Justice Department as articulated by Assistant Attorney General Stephen Trott on May 20, 1985 before the Committee and the combined views of the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA) which were presented to this Committee on July 30, 1985. Based on this review and the poll of our membership, we are concerned that enactment of the pending bills without amendments would significantly undermine the appropriate remedial purposes civil RICO can serve.

Civil RICO has great attraction to prospective plaintiffs. Its attractions have been aptly summarized by the Assistant Attorney General in charge of the Criminal Division in testimony presented before the Senate Committee on the Judiciary on May 20, 1985:

> Apart from the prospect it holds for treble damages and attorney's fees, the statute provides ready access to federal courts -- with their liberal procedures governing such matters as service of process and discovery -- to plaintiffs whose claims would otherwise not merit federal attention at all or would be cognizable only upon compliance with strict standing or other procedural requirements.
>
> .....
>
> RICO's availability in such cases results from the conjunction of two factors: the inclusion of various forms of fraud in its definition of 'racketeering activity', and the ease with which the statutorily required 'pattern of racketeering activity' can be derived from what is essentially a single fraudulent scheme, executed in a manner that twice gives rise to federal jurisdiction. These factors make it possible, for example, for a plaintiff involved in an ordinary commercial dispute to seek recovery under RICO by alleging a scheme to defraud on the part of his adversary, the involvement on an 'enterprise' in the scheme, and the mailing of two letters or the making of two telephone calls for the purpose of carrying out the scheme. Similarly, in the securities area, a RICO claim can be brought against an organization on the basis of a single allegedly fraudulent sale of securities effected by means of two filings, mailings, or telephone calls. In other words, RICO makes it possible to seek treble damages in virtually every case of commercial mail or wire fraud committed by or through an organization, and in many security fraud cases as well.

The Department of Justice's survey of the use of civil RICO demonstrates its concentrated use in cases involving securities, mail, and wire fraud. Its statistics show that two-thirds of all RICO cases involved these offenses as the underlying predicate crimes. Forty-two percent of all the cases it surveyed involved only one alleged criminal episode but RICO was available because of multiple mailings or telephone calls.

It is this use in the fraud area which has caused most of the criticism of civil RICO. This criticism does appear to have merit, particularly insofar as as the RICO statute may be applied to single-episode transactions. However, this does not justify narrowing fraud as a predicate offense to the point that it is basically unusable. We do not agree with those who claim that civil RICO should not be applied to business crime because that may unfairly stigmatize legitimate businessmen as racketeers. If businessmen commit fraud, they are not legitimate. If the label is the problem, that can and, as explained below, should be changed. Fraud can cause great harm to its victims. It is, therefore, no less deserving of treble damage redress than many of the other predicate offenses. It certainly is as harmful and offensive as violations of the antitrust laws which have long given rise to treble damages. We do not believe, therefore, that fraud should be eliminated as a predicate offense unless combined with a non-fraud violation.

One area that merits attention is the definition of "pattern of racketeering activity." This is consistent with a suggestion of the Assistant Attorney General in charge of the Criminal Division and a specific recommendation of the ABA's Criminal Justice Section RICO Committee. Significantly, both the majority and dissenting opinions in Sedima, S.P.R.L. v. V. IMREX Co., Inc, 102 S.Ct. 3275 (1985) drew attention to the need for the plaintiff to prove a "pattern of racketeering activity." Emphasis was given to the fact that two isolated acts of racketeering do not constitute a pattern. Instead, the majority and dissenting opinions noted that it was "the factor of continuity plus relationship which combines to produce a pattern," citing the Act's legislative history. Although the issue of the appropriate definition and application of "pattern or racketeering activity" was not before the Supreme Court in the Sedima case, it may be that the Court majority emphasized this aspect of the statute to allay fears that its application was as broad as alleged by critics of the statute.

Given this emphasis on the definition of "pattern or racketeering activity" by the Supreme Court and the suggestion of the Department of Justice and the ABA Criminal Justice Section RICO Committee, it would be helpful to incorporate in the statutory language itself more restrictive language defining the requirements for a "pattern of racketeering activity." The recommendation of the ABA's Criminal Justice Section RICO Committee merits special attention. The mandate of the Committee was to draft model legislation for the consideration of state legislators in the area of RICO. Its report, dated April 18, 1985, noted that: "[t]he Committee was in general agreement that any state statute should attempt to define the concept 'pattern' more narrowly than the federal statute. The definition of 'pattern' in the model statute is, therefore, more restrictive than federal RICO." The definition of "pattern suggested by the committee is as follows:1/

"Pattern of criminal activity" means two or more occasions of conduct

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1/ The RICO Cases Committee also recommended that the phrase "pattern of racketeering activity" be changed to "pattern of criminal activity." Hence, the difference in precise terminology between the model statute and the existing federal statute. This will be discussed briefly below.

1. that

   (i) constitute criminal activity;

   (ii) are related to the affairs of the enterprise;

   (iii) are not isolated; and

   (iv) are not so closely related to each other and connected in point of time and place that they constitute a single event;....

The Committee summarized the effect of this "narrowing" of the federal statute. It said; "[t]wo separate offenses that occurred as part of a single transaction that amounted, in effect, to a single event would not fall within the statute, as it does under present federal law. See, e.g., United States v. Bascaro, 742 F.2d 1355, 1360-63 (11th Cir. 1984) (possession and importation)."

This change should respond to the Department of Justice's finding that forty-two percent of civil RICO cases involved a single episode. Single transaction cases should not constitute a RICO case. Indeed, there may be a question whether the word "event" in the proposed definition is broad enough to exclude the category of cases that should not fall within civil RICO. In this respect, the Committee's proposed legislative model may need modification but it is at least a thoughtful effort.

Another possible helpful change concerns the burden of proof, a change also suggested for consideration by Assistant Attorney General Trott. The underlying predicate offenses for establishing a pattern of racketeering activity all involve criminal conduct. Absent the requirement that criminal convictions constitute the basis for a finding of racketeering activity, it may not be unreasonable to impose a somewhat higher burden before a defendant is found liable for severe civil sanctions for having engaged in conduct that is criminal. A standard of clear and convincing evidence to establish civil RICO liability would increase the burden of proof on a plaintiff but not require the heavy burden of proof beyond a reasonable doubt in a criminal case. This is not a formal recommendation of NAFUSA and our membership may well have differing views on it.

We do not, however, agree with the proposed imposition of a requirement of prior criminal convictions for use of civil RICO. The objection to this based on the plea-bargaining power it would give to prosecutors is not overly persuasive. However, because of the limited resources of prosecutors, whether they be federal, state, or local, restriction of the remedies available to a person injured by a pattern of racketeering should not be dependent on whether the prosecutor's office has seen fit to initiate a RICO prosecution and been successful. Prosecutors appropriately have wide discretion in determining whether to prosecute and what charges to bring. Their exercise of this discretion should not control the right of private litigants to seek redress for violations of their rights.

Another suggestion to restrict perceived abuse of civil RICO is requiring governmental approval before a private litigant can initiate a civil RICO suit. Institutional plaintiffs, such as federal, state, or local governments, can and indeed should have a mechanism for reviewing and centralizing the use, criminal or civil, of a statute with the broad language and severe sanctions of RICO. But a plaintiff who has a good faith basis for instituting a civil RICO suit should not be dependent on prior approval by a government authority. The government is in no position to review the decision of private parties to seek redress in the courts of violation of their rights. Thus, while NAFUSA commends the Department of Justice for issuing guidelines on the application of RICO in criminal cases and instituting a review process before a RICO criminal case is brought, that review process cannot reasonably govern a private litigant's evaluation of his basis for seeking the remedies available under civil RICO.

Some supporters of RICO suggest that it should be retained because private litigants can serve as a supplement to law enforcement efforts which, because of limited resources, cannot possibly prosecute all potential RICO violations. The Supreme Court has rejected any attempt to limit the use of RICO to organized crime cases, however one defines that term. Although not so limited, the principal use of RICO by prosecutors should be for that purpose. If this is so, it is unrealistic to expect that private litigants can supplement federal law enforcement efforts. Although treble damages offer an attractive financial reward together with a recovery of attorney's fees, very few private plaintiffs will have the fortitude and the resources to undertake a RICO prosecution against organized criminal elements.

Statistics gathered by the Department of Justice demonstrate that private litigants have brought civil RICO in few cases relating to organized crime. This low percentage is likely to continue. The fact that civil RICO, however, cannot reasonably be expected to serve as a meaningful supplement to law enforcement efforts against organized crime does not mean that the remedies available by civil RICO should be eliminated. These remedies or the prospect of such remedies can serve as a meaningful deterrent for those who would engage in a pattern of racketeering activity. The civil RICO statute, properly circumscribed, can serve that beneficial deterrent purpose and also provide appropriate remedies for persons who can convincingly demonstrate that they have been injured by participants or perpetrators of a pattern of racketeering activity.

It is not necessary, however, that those who commit RICO offenses be labelled racketeers. We recommend that the words "racketeer" and "racketeering" be stricken from the RICO statute wherever they appear and the words "criminal" or even "illegal" be substituted in their place. We recognize that this does not work any substantive limitation on the reach of civil RICO. Nevertheless, as lawyers who have had clients who have felt the sting of being called "racketeers" in civil RICO cases, we are compelled to state that the "stigmatisation" argument in many cases is real and is in the statutory scheme, totally unnecessary. Therefore, we would support any proposal that would read the word "racketeer" out of RICO, even if it resulted in a brand-new acronym for the statute.

The above sets forth some general comments concerning civil RICO. As reflected by the poll and comments made by those who responded to it, the views on civil RICO by our membership vary widely. This wide variety of opinion is reflected in other studies of civil RICO, such as those by the American Bar Association, and also by the narrow split in the Supreme Court decision in the Sedima case. The majority sentiment appears to favor retention of civil RICO with some restrictions, a sentiment that reflects the views of the NAFUSA membership. This majority sentiment opposes outright repeal. Finding an appropriate accommodation of the competing interests is certainly a challenging task for this Committee. We hope that our views will be helpful to this Committee.

We will be pleased to try to answer any questions of the Members of the Committee. Thank you very much for the opportunity to have presented our views.

Senator HATCH. Thank you so much; we appreciate having your testimony.

Mr. Bertz, we will go to you next.

Mr. BERTZ. Senator, I want to first of all thank you and the committee for the invitation to appear here this morning.

I am a sole practitioner of law, representing primarily fraud victims. My office is in Los Angeles, CA, where I was formerly an SEC trial attorney and a representative of that organization to the Los Angeles Organized Crime Strike Force, and special attorney for the U.S. Department of Justice.

I am here to discuss and respond to your questions regarding the position of persons who are emotionally and economically decimated from the perpetuation of fraud against them. Also, I am here to discuss showings in a study that I made, contrary to the statements of Mr. Richard Swanson this morning that there is no evidence of involvement of people in the business community in the kind of conduct that Congress was intending to deal with.

The study shows that continuous defrauders work in the securities marketplace; they work in a somewhat organized fashion. They use and include registered broker dealers. Even stock exchange members are not exempt or immune from engaging in this kind of conduct.

They include people who are of interest to the organized crime strike forces, who certainly are those whom this committee and Congress are concerned be affected by the RICO legislation.

I have made a written submission to the committee which basically is in three parts. It introduces an editorial I was asked to write which should be published shortly, which expresses my view that catch-phrases such as "garden variety fraud" are merely labels to excuse unacceptable conduct, whereas RICO applies to patterns of egregious criminal conduct in its current form.

I also consider RICO an appropriate supplement to the securities laws, and I disagree heartily with those who would state that every securities claim, or nearly every securities claim will be made as well under RICO.

I am one of those authors who has written on the manner of filing claims under RICO. In my writings, I specifically caution those plaintiffs' counsel with regard to rule 11 and other practical considerations with regard to filing those claims.

In my own practice, I have, since first using RICO, filed more non-RICO claims in the securities field than RICO claims, and I think there is a definite myth and misconception of the value of RICO in many securities claims.

The editorial also dispels and debunks certain myths about the settlement value and the effects of attorneys' fees in civil RICO actions, and discusses rule 11 as an adequate method and mechanism for dealing with good-faith claims.

Certainly, this committee has been told of the lack of effectiveness of that rule in the past. However, the 1983 amendments not only strengthen that rule, but the notes of the advisory committee very clearly indicate the strength of it.

I would note that I am advised through statements which were made at a conference yesterday that the judges and their judiciary councils are meeting and discussing the uses of rule 11. Perhaps we should be concerned whether the balance will be maintained whereby valid actions will still be able to go forward without attorneys and parties being intimidated against using RICO in valid actions where Congress is concerned about having the desired deterrent effect.

The second part of my submission introduces the study that I referred to. I think it is most interesting, if you look through that study, to try to follow some of those names and see where they crop up again and again.

This is a very limited study; it was made with my limited resources and the time I could take out from sole practice. Your agencies here in Washington have the resources to do a more complete study.

Before someone goes on, as Judge Oakes did in the Sedima appellate decision, and comes to an unstudied decision as to what Congress meant or did not mean, I would suggest that this committee have a more complete study made.

The third part of my submission discusses a few of the proposals before you. I would just like, if I might, to list three things to focus on, and that is; first, rule 11; second, the fact of the importance of the treble damages and attorneys' fees in the system of enforcement of the law, inasmuch as the victims are often confronted with the concern expressed in their words, I have not got the money to throw good money after bad in enforcing some claim.

Third, I would ask two questions. When you consider changes in the law under the word "reform" or whatever, you should consider: How badly you really want to rid society of the egregious patterns of criminal conduct? And to each proposal, how would significant wrongdoers use that new limitation in the law to further their own conduct?

Thank you very much.

[The statement follows:]

STATEMENT OF MICHAEL A. BERTZ
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Private Civil RICO Lawsuits

September 24, 1985

Chairman Thurmond and Members of the Committee:

First let me thank you for this opportunity to appear before you, to introduce myself, and to explain why it is a special pleasure for me to be here.

I am an attorney engaged in the sole practice of law primarily representing fraud victims in securities and related business matters. My law practice is in California where I was formerly a trial attorney for the Securities and Exchange Commission, a representative of that agency to the Los Angeles Organized Crime Strike Force, and a Special Attorney for the United States Department of Justice.

The special pleasure of this appearance comes from the fact that, as a sole practitioner primarily representing individuals victimized by fraud, I would normally have little or no opportunity to be in Washington, D.C. today to speak with you on a matter of vital interest to victims of fraud. While business and regulatory interests are more freely able to make appearances in our capital, the quirk of timing which gives me this opportunity has clarified for me the need for this Committee to keep its sights clearly focused upon the basic purposes of RICO. While special interests are decrying RICO in its application to certain of those among us who refuse to conform to the norms of conduct expected of all of us, we should not loose sight of Congress' focus upon the need for protection for people affected by continuous patterns of egregious criminal conduct.

In addressing this issue this morning I would like to submit two documents which state my views on a number of topics of concern to this Committee; and, after introducing those documents, use the balance of this submission to address certain issues which I understand have come before you in the current efforts to amend RICO.

Appendix A to this submission is a draft of an editorial I was recently asked to write based in part upon a study I made of continuous securities violators and in part upon my attitudes about RICO which are reflected in an article published earlier this year in the Civil RICO Symposium edition of the California Western Law Review. In addition to delineating certain findings from that study, the editorial deals with catch phrases used to attack RICO's application to fraud. In response to those catch phrases, the editorial discusses my views that (1) RICO applies to patterns of criminal fraud only, and use of the phrase "garden variety fraud" is merely labeling to excuse unacceptable conduct, (2) RICO is an appropriate supplement to the securities laws, which does not preempt those laws, (3) RICO is not an appropriate claim in all securities lawsuits, (4) Rule 11 of the Federal Rules of Civil Procedure provides ample constraints upon abusive proceedings, without undermining Congress' intent that civil RICO actions should play an important role in eradicating the societal ills addressed by RICO, (5) attorney's fees, which can be obtained only upon successful conclusion of a RICO lawsuit, further this Congressional intent, (6) RICO claims have settlement value only if they are strong claims, and (7) treble damages for the egregious conduct to which RICO applies is not unconscionable, and has greater potential deterrent effect than exists from the discretionary nature of punitive damages under state law claims. I will be happy to submit copies of the editorial itself after publication, which is anticipated shortly.

Appendix B to this submission is a copy of the report of the study of continuous securities violators which appears as an appendix to the law review article referred to above, and which is discussed in the editorial. A number of unstudied and seemingly unsupported statements have been made by a variety of persons on the subject of RICO's application to

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business and securities fraud. Contrary to those statements, this study reflects that within the securities marketplace there are perpetrators of patterns of continuous intentional conduct of the type with which Congress intended to deal. It should be kept in mind that "fraud" was included as one of the three basic types of conduct identified with organized crime in the first phrase of the Statement Of Findings And Purpose to the Organized Crime Control Act of 1970; and "harm [to] innocent investors" was identified in those findings as one of the important effects of the conduct being proscribed. While the study included within this submission was limited in its scope, it should make clear that if anyone seriously questions the factual basis for inclusion of mail, wire and/or securities fraud within RICO further verification of that basis can be obtained.

Now to additional issues which I understand have been raised by or before this Committee.

Firstly, with regard to questions posed by Chairman Thurmond in a speech on January 8, 1985, I feel that the comments of Philip A. Feigin, of the North American Securities Administrators Association, Inc., in his written statement for his appearance before this Committee on July 31, 1985, are well taken. However, I would add the following: With regard to the inclusion of RICO claims in lawsuits between competitors, if a competitor uses patterns of intentional criminal conduct to gain competitive advantage, RICO was meant to apply. To the extent that the competitor uses only those business practices which fall within the norms of our society, however, RICO will not apply, and any improper use of a RICO claim in a lawsuit is amply addressed by Rule 11's provisions for dealing with bad faith claims.

With regard to the suggestion that the predicate acts involving mail, wire, and securities fraud be limited by specifying only certain types of fraud to be included within RICO, fraud is of its nature amorphous. As soon as you limit by identification those forms of fraud to which RICO will apply you provide the imaginative and sophisticated wrongdoer with the means of avoiding RICO and of avoiding Congress' intention to eradicate patterns of intentional conduct.

The simple fact is that RICO as enacted applies to patterns of criminal conduct only, and no other limitation should be necessary to protect those who are willing to assure that their conduct complies with societal norms. While detractors have disagreed with my statement that only criminal conduct is involved in fraud under RICO, section 1961(1)(B) applies to mail and wire fraud only when the conduct engaged in would be "indictable", which requires an allegation of criminal intent; and section 1961(1)(D) applies to securities fraud only when the conduct engaged in would be an "offense" "punishable" under the federal securities laws, which requires the elements of the criminal sanctions provisions of those laws. That these elements of criminal conduct must be alleged in good faith, and then proven, provides all the assurance we should need that RICO applies only to patterns of egregious activity beyond individual wrongs which may be pursued, for example, under the securities laws upon reckless conduct.

The suggestion that the Attorney General's office first review private civil cases before they could be pursued would undermine the potential deterrent effect of civil RICO. What priority would this review be given? In these days of tight budget constraints, would this function be sufficiently financed so as to assure timely review? What effects would untimely review have upon the statute of limitations? Would the Attorney General's office be making political decisions on which kinds of fraud to approve for litigation, rather than concerning itself with the strength of the evidence in relation to the elements existing in the statute? Would not this extra layer of discretionary review further discourage injured persons from pursuing civil actions?

The suggested amendment whereby at least one non-fraud predicate act would be required as a part of the pattern of unlawful conduct would provide a safe harbor not only for those intentional wrongdoers who like to consider themselves a part of "legitimate" business, but also for any other perpetrators of patterns of criminal conduct so long as they limit their conduct to fraud. This applies to a member of an organized crime family who is sophisticated enough to look for the cracks in the law through which to ply his trade, as well as to any other person. For RICO to have a deterrent effect upon patterns of criminal fraudulent conduct it must remain unfettered by requirements that additional predicate acts be shown.

Whatever suggestion is made to Congress, the central question is, what conduct do you really wish to deter? For each suggestion for change in RICO, the concern should be, what effect would that proposal have upon this statute's application to continuous perpetrators of egregious criminal conduct? In reality there is no need for Congress to protect the legitimate business or professional so long as that word "legitimate" applies to the manner in which the business or profession is actually conducted, and is not merely a label reflecting an undeserved status.

I have attempted here to address certain primary issues as they relate to the inclusion of fraud within RICO, knowing that there are a myriad of more detailed issues before you as well. I would be pleased to address myself to any questions you may have regarding these comments or the application of these thoughts to any other issue before you.

Thank you again for this opportunity to express my thoughts to you.

RICO Law Reporter

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Vol. 2 No. 4 **Washington, D.C.** **Oct., 1985**

OPINION

This month's editorial on whether securities fraud should be removed from the reach of civil RICO was written by Michael A. Bertz, Esq. Mr. Bertz is a former trial attorney for the Securities and Exchange Commission; a former representative of the SEC to the Los Angeles Organized Crime Strike Force; and a former Special Attorney for the United States Department of Justice. The author's views do not necessarily reflect those of the *RICO Law Reporter*.

RICO was intended to "eradicate organized criminal activity from the fiber of our society;[1] its civil remedies were considered by Congress to play an integral part in accomplishing this purpose.[2] Therefore, where persons have engaged in willful, knowing or intentional[3] patterns[4] of securities fraud, why shouldn't RICO apply?

A hailstorm of protest is being raised in Congress by a variety of business and professional groups seeking to dilute RICO and to obtain a safe harbor from its application. Curiously, the protestors are the same business and professional groups whose reputations are often damaged by the very conduct they now seek to delete from RICO.[5]

A recent limited study of continuous securities violators[6] found that: (1) some violators engage in repetitive fraudulent conduct which does not terminate upon becoming the subject of one or two enforcement actions; (2) repetitive violators who engage in fraudulent schemes with a group of individuals often work with one or more members of that group in an organized fashion in later securities fraud schemes; (3) registered broker-dealers and other professionals engage in repetitive unlawful conduct in connection with nonprofessionals who themselves are continuous violators of securities fraud laws; (4) broker-dealers who are members of national stock exchanges are not immune from engaging in this type of violative conduct; (5) repetitive violators, including broker-dealers and other professionals, have engaged in organized violative conduct with individuals who are of concern to the Organized Crime Strike Force of the United States Department of Justice; and (6) individuals who are of interest to the Organized Crime Strike Forces, and with whom

(continued overleaf)

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APPENDIX A

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Congress certainly intended to deal in enacting RICO, engage in repetitive securities fraud schemes using the facilities of registered broker-dealers and other professionals. *(See* "Securities Violations Study," document section, *Infra.)*

In light of these findings, it is not only appropriate to allow direct actions against "racketeers," but it is equally appropriate to allow actions against (1) business persons who are willing to engage in patterns of willful and intentional fraudulent conduct whom racketeers seek to use, as well as (2) business persons who are willing to engage in patterns of intentional fraudulent conduct which racketeers will emulate if that conduct is helpful to them and condoned by the law.

RICO applies to "racketeering activity" rather than to a person's membership status in a criminal syndicate. Therefore, if you participate in the type of criminal conduct engaged in by organized crime, you are subject to RICO no matter who you are. As the Second Circuit stated in *United States* v. Carter:[7]

> "The fact that the alleged perpetrators are presumably respectable and entrusted with responsibility by an electorate or a profession or by stockholders does not suggest, in our view, that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and wearing a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit."

Despite the evenhandedness of RICO, the starched white collar lobby is garnering support for limiting application of this law by tirelessly repeating catch phrases intended to evoke negative reactions to RICO. These catch phrases include: (1) RICO is being applied to "garden variety fraud"; (2) RICO is being used to "preempt" the securities laws; (3) all securities lawsuits will be pursued under RICO; (4) constraints need to be placed upon abusive uses of RICO; (5)RICO claims are being pursued for the attorney's fees only; (6) RICO claims are being pursued for settlement purposes only; and (7) treble damages under RICO are unconscionable.

A less emotional review of these matters, however, reflects the following:

1. RICO Applies To Intentional Fraud, Whatever Self Serving Labels Some Persons May Use

Congress expressly included "indictable" mail and wire fraud and "punishable" fraud in the sale of securities as actionable predicate acts under section 1961(1), thereby applying RICO to intentional conduct.[8]

Those who raise their voices in protest against a civil plaintiff pursuing remedies under RICO for "garden variety fraud" provide no additional standards to distinguish actionable from non-actionable fraud. Nor does the existing law provide such a distinction. As Judge Pratt wrote in *Furman* v. *Cirrito:*[9] "It seems almost two obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm."

The phrase "garden variety fraud" is nothing more than an effort to use a watered down label to say that some fraud is acceptable in our society. In fact, use of this label to avoid liability is itself an insult to those persons in the securities industry who strive to conduct themselves properly under the law for the benefit of the investor/consumer.

2. RICO Provides An Appropriate Supplement, Without Preemption, To The Securities Laws.

Although there is no preemption, RICO clearly supplements other laws. In fact, RICO was designed at least in part to deal with the prior ineffectiveness of many laws in rooting out onerous patterns of conduct.[10] Securities laws, as demonstrated by the "Securities Violations Study,"[11] fit into this pattern of prior limited effectiveness in dealing with repetitive intentional conduct.

Moreover, cumulative remedies provided by the securities laws and RICO further the broad remedial purposes of both.[12] In fact, the Securities Exchange Act explicitly anticipates supplemental remedies. Section 28(a) provides that: "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity."[13] This provision existed in 1970 when RICO was enacted and was retained when amendments to the Securities Exchange Act were adopted in 1975 and 1982. "These provisions confirm that the remedies in each Act were to be supplemented by 'any and all' additional remedies."[14]

3. RICO Claims Are Not Appropriate For All Securities Fraud Lawsuits

While enhanced remedies are provided under RICO which are not available under the federal securities laws, additional elements must be proven under RICO. A violation of the antifraud provisions of the Securities Exchange Act requires only one misrepresentation whereas a RICO violation requires commission of at least two predicate acts in a "pattern" of activity. Furthermore, a Securities Exchange Act violation may result from recklessness, which is not sufficient scienter to satisfy the RICO requirement that fraud in the sale of securities involve an "offense" "punishable" under federal law.[15]

The necessity and expense of proving these additional elements, coupled with the good faith pleading rules discussed below, make it clear that not all securities lawsuits can or should include RICO claims.

4. Rule 11 Provides Appropriate Constraints Against Abusive Uses Of RICO

Rule 11 of the Federal Rules of Civil Procedure states in pertinent part:[16]

> "Every pleading...of a party represented by an attorney shall be signed by at least one attorney of record in his individual name...The signature of an attorney...constitues a certificate by him that he has read the pleading...; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....If a pleading...is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who

> signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading. . . .,including a reasonable attorney's fee."

While historically Rule 11 has had little effect in deterring abuse, the Notes of the Advisory Committee On Rules make it clear that under the amended rule sanctions "shall" be imposed upon abusers, be they parties or counsel.

Courts have begun to impose Rule 11 sanctions in RICO matters in the manner outlined by these Notes. For example, in the matter of *Financial Federation, Inc. v. Ashkenazy,"* a financial institution brought suit against shareholders in anticipation of a shareholder's suit for breach of fiduciary duty. The suit charged the shareholders with RICO and other securities law violations. Upon finding no reasonable basis to support the RICO claim, the court awarded defendants, pursuant to Rule 11, $150,000.00 for fees "with respect to the RICO claim" along with additional fees related to the other claims filed in that action.

Rule 11 is satisfied only when counsel has done his homework both on the law and the facts and the application of one to the other, in concluding that a viable claim exists under RICO." Therefore, this Rule provides a potent tool to deter the filing of bad faith claims. A stricter rule or a cumbersome procedure would conflict with Congress' intent that civil remedies play an important role in carrying out the purposes of RICO.

5. Attorney's Fees Can Only Be Obtained Upon Successful Conclusion Of The Lawsuit

In arguing that attorney's fees wrongfully encourage lawsuits, those who seek to dilute RICO conveniently forget that fees are awardable under section 1964(c) only if there is an affirmative finding that "a violation of section 1962" occurred.

Step into the shoes of persons emotionally and economically decimated by fradulent conduct who are then told that even if they go through the additional drain and risk of loss of a lawsuit, they cannot be made whole because the securities laws do not provide for recovery of attorney's fees. Little wonder that many securities problems are not brought to litigation.

Congress sought to encourage, through RICO's attorney's fees and treble damages provisions, private civil actions as a deterrent to patterns of intentional fraudulent conduct. RICO was viewed by Congress as part of a cross-quilted effort to cleanse our society of a major problem. In light of the costliness of fraud litigation, deletion of attorney's fees from the available recovery would seriously dilute the role civil claims can play in this effort.

6. A RICO Claim Has Settlement Value Only If It Is a Strong Claim

The reality appears to be that a weak RICO claim brought in an otherwise viable lawsuit adds little incentive toward settlement.

Moreover, some defendants, overcome by their emotional reactions at being charged with "racketeering," find it difficult to objectively assess their risk of losing the lawsuit and other factors involved in valuing settlement. This is a practical matter for plaintiff and counsel to consider since addition of the RICO claim against this type of defendant may produce barriers to the communication necessary to settle lawsuits.

On the other hand, where a strong RICO case exists, some defendants, particularly broker-dealers who have a history of waiting to determine whether the costliness of suit will cause it to wither away, may be moved to settle in a more timely fashion for an amount more closely related to actual damages. This would further RICO's intended deterrent effect as settlements more closely approximating actual damages have the potential of causing prospective defendants to pay more attention to avoiding the type of conduct which could result in RICO claims in the first place.

7. Treble Damages For Egregious Conduct Are Not Unconscionable

Treble damages is neither a unique nor an unconscionable remedy. For example, this remedy is available to plaintiffs in anti-trust actions. Both RICO and anti-trust statutes were enacted for strong public policy reasons; there is no particular reason why businesses injured by an anti-trust violation should fare better in a lawsuit dealing with that conduct than should a person injured by a RICO violation. This is particularly true since RICO acts, unlike anti-trust violations, necessarily entail criminal conduct.

Moreover, treble damages under RICO are not unconscionable; punitive damages provided "for the sake of example" under state law claims in securities cases can provide a comparable recovery." However, as compared to the discretionary nature of punitive damages, the certainty of trebling under RICO's civil damage provisions has a greater potential to achieve the intended deterrent effect sought by Congress.

Conclusion

Expansion of the organized criminal element into "legitimate" business activity was one of the primary concerns of Congress in enacting RICO. As the Statement Of Findings And Purpose of the Organized Crime Control Act of 1970 of which RICO is a part notes, the activity of organized criminals "annually drains billions of dollars from America's economy by unlawful conduct," including "fraud," causing significant "harm [to] innocent investors," among other people."

In considering the current protests raised against RICO, particularly as it applies to securities fraud, the real question is, how badly do we really want to rid our society of organized criminal conduct? Rather than seeking to amend the law to provide safe harbors, "legitimate" businesses should recognize that they stand to benefit by a less fraud-ridden marketplace. The bottom line for securities brokers and other businesses and professionals may be that civil RICO provides the economic incentive to make the necessary expenditures to ensure compliance with mail, wire and securities fraud laws, and to ensure that business is not conducted in ways which attract real "racketeers." Such a result is consistent with the deterrent purposes Congress intended in enacting RICO.

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[1] Organized Crime Control Act of 1970, Publ.L. No. 91-452, S 904(a), 84 Stat. 923. *See, United States* v. *Turkette*, 452 U.S. 576, 585, 589, 101 S.Ct. 2524, 2530 (1981).

[2] See discussion of comments of Senator Hruska upon introducting a forerunner of RICO. Blakely, *The RICO Civil Fraud Action In Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L.Rev. 237, 261 (1982) [hereinafter cited as "Blakey, *Reflections*"].

[3] Securities fraud is chargeable as "racketeering activity" under RICO only if it involves an "offense" "punishable" under federal law. 18 U.S.C. S 1961(1) (D). This language clearly involves conduct of a criminal nature. The federal securities laws provide that criminal sanctions may lie when a person "willfully" violates those laws. Section 24 of the Securities Act of 1933, 15 U.S.C. S 77x; Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. s 78ff(a). While most securities fraud schemes also involve use of the mails or interstate telephone lines, RICO only includes mail or wire fraud as "racketeering activity" when that conduct is "indictable." See 18 U.S.C. S 1961(1) (B).

[4] See the discussion of the importance of the "pattern" element to a RICO claim in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, ___ U.S. ____, 105 S.Ct. 3275, 3285-3286 and note 14, 2 R.L.R. 68 (July 1, 1985).

[5] As Philip A. Feigin, of the North American Securities Administrators Association, Inc., testified recently before the Senate Judiciary Committee:

> "Investment-theme fraud is a problem of staggering proportions, perpetrated by clever swindlers over a period of many years, involving intricate webs of corporations, banks and individuals. They constitute a major element of organized crime in this country which can no longer be ignored."
>
> "Although no one knows for certain, annual losses to investment-theme fraud in America are now an estimated $40 billion..."

[6] Bertz, *Pursuing A Business Fraud RICO Claim*, Appendix A, 21 Cal.W.L.Rev. 246, 273 (1985).

[7] 493 F. 2d 704, 708 (1974). *See also, United States* v. *Campenale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied sub nom., Mathews* v. *United States*, 423 U.S. 1050 (1976); *United States* v. *Aleman*, 609 F.2d 298, 303-304 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Sutliff* v. *Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); Blakey, *Reflections, supra* note 2 at 261, 271, 275-276, n. 75, n. 78 and accompanying text, n. 87, and n. 112 and accompanying text.

[8] *See* note 3 and accompanying text.

[9] 741 F.2d 524, 529, 1 RLR 2 Appendix C (2nd Cir. 1984), *Jud. vacated*, ____U.S.____; 105 S.Ct. 3550 (1985).

[10] *See, United States* v. *Turkette*, 452 U.S. at 586, 101 S.Ct. at 2530 (1981); Blakey, *Reflections, supra*, note 2 at 266.

[11] *See* document section *infra*.

[12] *See, Herman & MacLean* v. *Huddleston*, ____U.S.____, 103 S.Ct. 683, 689-690 (1983). *See also*, Blakey, *Reflections, supra* note 2, at n. 92.

[13] 15 U.S.C. S 78bb(a) (1982).

[14] *Herman & MacLean* v. *Huddleston*, 103 S.Ct. at 688.

[15] Compare note 3, *supra* with *Nelson* v. *Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978); *Mihara* v. *Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir. 1980).

[16] As amended effective August 1, 1983. *See also*, 28 U.S.C. Section 1927.

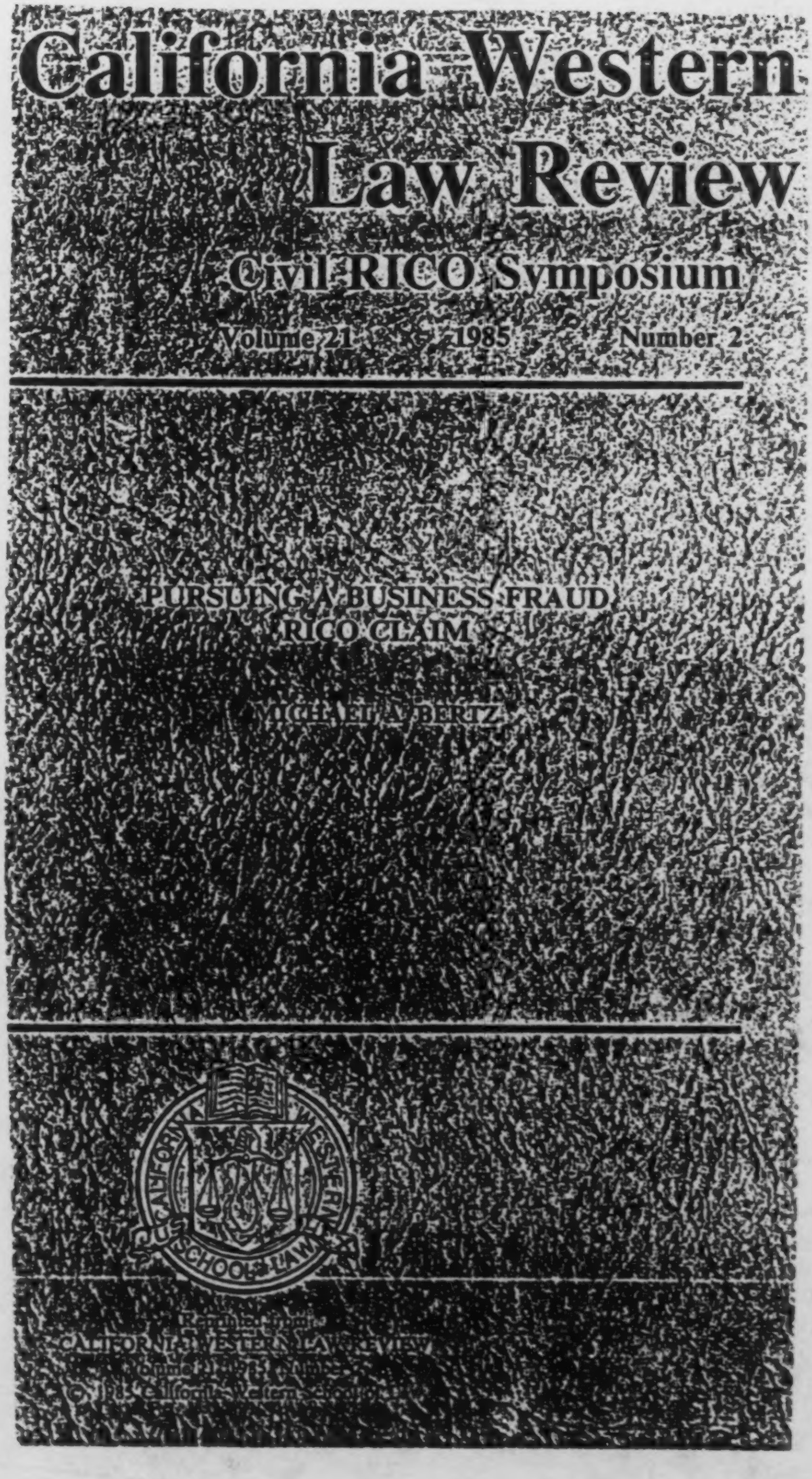
[17] [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,489 (C.D. Cal. 1983).

[18] *See* Notes of the Advisory Committee On Rules.

[19] 619 F.2d at 825, quoting from California Civil Code Section 3294.

[20] Examples of punitive damage awards which approximate RICO's treble damage provision include *Mihara* v. *Dean Witter & Co.*, 619 F.2d at 817, 825-830, where the Ninth Circuit upheld a jury award, against a claim of excessiveness, of approximately $2.70 in punitive damages for ever $1.00 in actual damages awarded on a churning/breach of fiduciary duty claim; *Holmberg* v. *Morrisette and Mintex Corporation*, No. 3-83-1383 (D. Minn. Feb 1, 1985), where the court awarded $2.00 in punitive damages for every $1.00 in actual damages, along with a treble damage RICO award, carefully assuring that between the enhanced portion of the RICO damages and the punitive damages only one would be collectable; and *Miley* v. *Oppenheimer & Co., Inc.*, 637 F.2d 318, 326, 329-330 (1981) where the Fifth Circuit upheld a jury award of approximately $2.00 in punitive damages for every $1.00 in actual damages awarded on a churning/common-law fraud claim against claims of excessiveness.

[21] 84 Stat. 922-23 (1970).



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PURSUING A BUSINESS FRAUD RICO CLAIM

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APPENDIX A

Circuit Judge Oakes in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, states that since Congress did not consider the breadth to which RICO applies on its face the courts may consider what Congress would have done had it considered RICO's application to business frauds. He then proceeds to state his own unstudied conclusion that Congress would not have included business fraud matters within the ambit of RICO had Congress given this matter any consideration.[1]

Whatever problems this reasoning has as against rules of statutory construction, and the fact that mail, wire and securities frauds are explicitly included within the ambit of RICO, the record which could be placed before Congress raises significant questions of whether Judge Oakes' unstudied personal conclusions are correct.

Contrary to Judge Oakes' conclusion, there are numerous securities fraud violators who often associate together, who sometimes associate with persons considered to be members of organized crime, and who will use brokerage and other professionals who are willing to engage in fraudulent conduct.

The following is a report of a limited study of continuous securities violators.[2] This report indicates that if Congress desires to verify whether there is a factual basis for inclusion of mail, wire and securities frauds within RICO by requesting the appropriate federal law enforcement agencies to catalog continuous securities, postal and wire fraud perpetrators, there may very well be support for use of RICO as a weapon against whomever engages in continuous violative conduct, even if Judge Oakes might find this use abhorrent when otherwise "legitimate" businessmen are involved.[3]

The results of this study are reported here in the form of summaries from public documents relating principally to five individuals, each of whom engaged in a pattern of fraudulent conduct. Also reflected in the report of this study is the extent to which other fraud violators work with one or another principal party. Finally, this report reflects how business and professional people sometimes engage in patterns of fraudulent conduct as principals, or in participation with other continuous violators.

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[1] Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 501 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648).

[2] In addition to time limitations, the cumbersome nature of the cross referencing of public records on securities violators imposed its own constraints upon this study. The effect of these constraints is that this report reflects but a fraction of the continuous violators who would fall within the objectives of this study. However limited, the results reported here provide their own documentation of the breadth of this situation.

[3] *See Sedima*, 741 F.2d at 487.

A. MICHAEL GARDNER

1. Gardner Securities Corporation:[4] December 9, 1969 — Entry of temporary restraining order regarding the fraud, registration and net capital provisions of the federal securities laws against Gardner and Gardner Securities Corporation, a registered broker-dealer of which Gardner was the president and sole shareholder.

2. Radio Hill Mines Co., Ltd.:[5] July 30, 1970 — Complaint filed charging violations of the fraud and registration provisions of the federal securities laws against Sidney Stein, Albert Feiffer, Norman Rubinson, Michael Gardner, and others. September 16, 1971 — Indictment returned charging Stein and Rubinson with perjury during investigation. February 5, 1973 — Guilty plea entered for Stein. March 17, 1973 — Rubinson convicted. February 20, 1973 — Rubinson convicted of criminal contempt of preliminary injunction entered November 5, 1970.

3. Stern-Haskell, Inc., Diston Industries, Inc., Mobile Home Ventures, Inc.:[6] September 30, 1970 — Complaint filed charging violation of the fraud and registration provision of the federal securities laws against seventeen defendants including Sidney Stein, Albert Feiffer, Norman Rubinson, Michael Gardner, Lawrence Levine, William K. Chester, Alpha Securities, Inc., C.K.W. Securities, Inc. and Zenith Securities, Ltd. May 19, 1975 — Guilty plea of Stein and sentencing of Stein, Feiffer, Rubinson, Levine, Chester and others reported.

4. Control Metals Corporation:[7] October 13, 1970 — Complaint filed charging violations of the fraud and registration provisions of the federal securities laws against nineteen defendants including Seymour Pollack, Paul Sachs, Stanley M. Kaiser, Harold Rothman, Robert Rapp, J.H. Rapp Co., and registered broker-dealer, Michael Gardner, William Cudd, P.J. Gruber Co., Inc., a registered broker-dealer, and Martin Ciment, d/b/a Crown Trading Co., a registered broker-dealer. June 21, 1973 — Indictment returned against Pollack, Sachs, Kaiser, Rothman and Cudd. December 17, 1973 — Pollack, Sachs and Cudd convicted, Kaiser having pled guilty to charges brought through filing of an information.

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[4] SEC Litig. Release No. 4497. All SEC releases cited in this Appendix are public documents available for inspection at the regional offices of the Securities and Exchange Commission.

[5] SEC Litig. Release Nos. 4710, 5169, 5759, 5769 and 5855.

[6] SEC Litig. Release Nos. 4768, 4781 and 6891.

[7] SEC Litig. Release Nos. 4780, 5951 and 6183.

5. *Spectrum, Ltd.:*[8] April 2, 1971 — Complaint filed charging violations of fraud and registration provisions of the federal securities laws against twelve defendants including Louis Israel Marder, James Morse, Michael Gardner, Michael Karfunkel,[9] Stuart Schiffman,[10] and Quido Benigno.[11] June 21, 1981 — Permanent injunction entered against Marder and Gardner. August 11, 1972 — Broker-dealer registration of Gardner Securities Corp. revoked and Michael Gardner barred from associating with any broker-dealer.

6. *Vendotronics Corporation:*[12] October 12, 1973 — Convictions entered on charges of securities fraud and conspiracy, among other charges, against nine defendants including Anthony Sano, Ronald Kazdin, Murray Levine, Anthony DeBenedetto, Michael Gardner, Fred Hesse and Louis Kaye. James Morse was reported as not being prosecuted further on the indictment in this matter upon his guilty plea to conspiracy to violate the federal securities laws in regard to the securities of Fleurette, Inc. (See B.9 below).

7. *Patterson Corporation:*[13] November 21, 1974 — Indictment, brought by the Los Angeles Organized Crime Strike Force in conjunction with the United States Attorney for the Southern District of California, returned charging mail and secruities fraud and conspiracy against eight defendants including Dalton Smith, Richard B. Anderson, a former bank and securities broker-dealer officer, Cleo H. Bullard, Edward A. Zuber and securities salesman Lawrence D. Share. Michael Gardner was identified as a co-conspirator. January 28, 1976 — Announcement of convictions and sentencing of Anderson, Bullard, Zuber and Share, Dalton Smith

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[8] SEC Litig. Release Nos. 4965 and 5057; SEA Release No. 9724.

[9] On August 31, 1970 a complaint was filed charging violations of the fraud and registration provision of the federal securities laws in the sale of securities of Select Enterprises, Inc. against Michael Karfunkel, Joe T. Boyd, Alan I. Segal, Joseph Azzarone dba Karen Co., Economic Planning Corp., a registered broker-dealer, and Emerson Titlow, a state senator from Nevada, among others. On September 27, 1971 the broker-dealer registration of Azzarone was revoked, and Azzarone and Karfunkel were barred from being associated with any broker-dealer in administrative proceedings related to Select Enterprises, Inc. and Spectrum, Ltd. SEC Litig. Release No. 4742; SEA Release No. 9346.

[10] On December 16, 1971, a complaint was filed against Stuart Schiffman, vice-president of Kelly, Andrews & Bradley, Inc., a registered broker-dealer, and others, charging securities fraud in the sale of securities of All-State Metal Stamping Corp. through Kelly, Andrews & Bradley, Inc. SEC Litig. Release No. 5268.

[11] On October 29, 1976, Quido Benigno pled guilty to conspiracy to commit securities fraud upon an indictment brought by the New York Organized Crime Strike Force against six defendants regarding sales of securities through Seed Capital Corporation, a registered broker-dealer. SEC Litig. Release Nos. 7491 and 7623.

[12] SEC Litig. Release Nos. 5778 and 6226.

[13] SEC Litig. Release Nos. 6316, 6563, 6624 and 7253; Indictment, CR 74-2277-G.T., U.S.D.C., S.D. Cal.

having died prior to trial. August and September, 1974 — Injunctions entered against further violations of the fraud and registration provisions of the federal securities laws against, among others, Dalton Smith (identified as an undisclosed principal of Patterson Corporation), Anderson, Bullard, Nationwide Registrar Transfer Agency, attorney Stanley T. Traska, and former stock broker Joseph Cono Caggiano.

B. FRED HESSE, aka FREDERICK VON HESSE, aka FRED WILLIAM FUCHSHUBER HESSE

1. Texas Building Company:[14] April 22, 1960 — Indictment returned against five defendants including Fred Hesse charging securities and mail fraud and conspiracy.

2. Monarch Asbestos Co., Ltd.:[15] June 21, 1960 — Indictment returned against twenty-eight defendants including Stanley Ira Younger, Fred William Fuchshuber Hesse, Louis Michael de Filippo, Arnold Naidich and Louis Michael Tortorello charging securities and mail fraud, sale of unregistered securities and conspiracy.

3. Atlas Gypsum Corporation:[16] October 21, 1960 — Plea of guilty or nolo contendere by twenty-four defendants regarding charges of securities and mail fraud and sale of unregistered securities through J.C. Graye Company, a registered broker-dealer. Defendants included Stanley Ira Younger, Louis Michael de Filippo, Murray Taylor, Fred William Fuchshuber Hesse, Arthur Tortorello, Carmine Lombardozzi and Robert Amer.

4. Federated Holding Co., Inc.:[17] July 17, 1963 — Permanent injunction against further securities fraud entered against Fred William Fuchshuber Hesse in an action involving securities sold through a registered broker-dealer.

5. Douglas Precision Parts, Inc.:[18] January 21, 1964 — Indictment returned on charges of securities fraud against Fred William Fuchshuber Hesse, Lewis Mayo,[19] Arnold Naidich, Arthur

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[14] SEC Litig. Release No. 1657.

[15] SEC Litig. Release No. 1711.

[16] SEC Litig. Release No. 1813.

[17] SEC Litig. Release Nos. 2260 and 2694.

[18] SEC Litig. Release No. 2837

[19] On April 3, 1979 a jury convicted Louis M. Mayo and James H. Dondich, aka Harold James, of conspiracy and securities fraud arising out of sales of securities of Reclamation District No. 2090 through Benchmark Securities, Inc., a registered broker-dealer. On June 17, 1976 a complaint had been filed against twenty-one defendants for

Tortorello, and Frank Sacco.

6. *American Berylium & Oil Corporation:*[20] May 15, 1968 — Complaint filed charging securities fraud, among other charges, against Frederick von Hesse, aka Frederick Fuchshuber, aka Fred Hesse, Vito Davanzo, Lawrence Gottlieb and others. July, 1970 — Permanent injunctions entered against Hesse and Gottlieb.

7. *Underwriters Investment Co.:*[21] November 29, 1971 — Report of convictions of Arthur Tortorello and John E. Dennett for securities and mail fraud and conspiracy. Guilty pleas were entered by Fred Hesse, Louis Kaye and Edward Zuber,[22] among others. Indictment brought by the New York Organized Crime Strike Force.

8. *Securities Data Center, Inc., Unidat Corp., Convan Corp., Zenitron Corp., General Time Sharing, Inc., United States Computer Corp.:*[23] February 2, 1972 — Permanent injunction entered against attorney Emanuel Fields, Frederick Von Hesse and Louis Kaye, and others regarding securities fraud and sale of unregistered securities.

9. *Fleurette, Inc.:*[24] April 4, 1973 — Indictment, brought by the New York Organized Crime Strike Force in conjunction with the United States Attorney for the Eastern District of New York, returned against sixteen parties including Dennis Carroll, Louis Kaye, Raymond Monacelli, James Morse, Norman Rubinson, Murray Taylor,[25] Arthur Tortorello aka Artie Todd, Alex Alexander and Equity Financial Trading Corporation. Named co-conspirators included Frederick Von Hesse, aka Fred Hesse. May 17, 1984 — Announcement of sentencing of Dennis Carroll, James Morse, Norman Rubinson and Equity Financial Trading. Monacelli and

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injunction against further violations of the securities laws. SEC Litig. Release Nos. 7460 and 8717.

[20] SEC Litig. Release Nos. 4013, 4668 and 4689.

[21] SEC Litig. Release No. 5230.

[22] In January, 1975 sentences were imposed upon Edward Zuber, Burney Acton, Michael Clegg, Joseph Azzarone, aka Karen Co., a registered broker-dealer, Anthony Scardino and Alan Segal upon guilty verdicts or pleas to an indictment charging securities fraud, mail fraud and conspiracy in the sale of securities of Pioneer Development Corporation. SEC Litig. Release Nos. 4892 and 6869.

[23] SEC Litig. Release No. 5332.

[24] SEC Litig. Release Nos. 5837, 6354 and 6699.

[25] On November 18, 1970 an indictment was returned charging Murray Taylor, Vincent Lombardo, John Dioguardi, Philip Bonodono, Carmine Tramunti and others with conspiracy, securities and mail fraud, and racketeering regarding sales of the securities of Imperial Investment Corporation. Named as co-conspirators were Sidney Stein and Anthony Soldano. SEC Litig. Release No. 4826.

Tortorello pled guilty and were sentenced in conjunction with other matters. Alexander was reported as being a fugitive. January 28, 1975 — Announcement of sentencing of Murray Taylor and Louis Kaye.

10. Vendotronics Corporation: See A.6 above, involving Michael Gardner, Ronald Kazdin, Murray Levine and Louis Kaye.

C. *LESLIE T. ZACHARIAS, aka* LEE ZACHARIAS, *aka* LEE ZAHARIAS

1. Texas Uranium Corporation:[26] May 7, 1969 — Complaint filed charging twenty-nine defendants with violating the fraud and registration provisions of the federal securities laws including Francis C. Lund[27] and John Taylor. Charged with violating the registration provision only were: Leslie T. Zacharias, R.F.S. & Associates, Inc. and Maurice Benjamin, aka Medwin Benjamin,[28] among others.

2. Continental Investment Corporation and Pan American Industries, Inc.:[29] August 5, 1969 — Complaint filed charging violations of the fraud and registration provision of the federal securities laws against Vern G. Ryan, Donald Tarzwell, aka Michael J. O'Shea, James W. Brewer, Houston Securities Corporation, a registered broker-dealer, George K. Waki, president of HSC, Pedro Jose Torres Velasquez, Leslie T. Zacharias, aka Lee Zaharias, R.F.S. Associates, Inc., and Wesley J. Moffatt, among others. Permanent injunctions entered against Ryan, Zacharias, Velasquez, Tarzwell, Brewer, R.F.S. Associates, Inc., Waki and HSC. October 23, 1971 — Tarzwell convicted of securities fraud in the sale of securities of Pan American Industries, Inc. February 13, 1973 — With regard to sales of securities of CIC, James W. Brewer pled guilty to a charge of criminal contempt of an October 18, 1968 injunction arising out of sales of securities of W.I.D.E., Inc.[30]

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[26] SEC Litig. Release No. 4310.

[27] On October 3, 1975 Francis C. Lund was found guilty along with others, of securities fraud in the sale of securities of Rio de Oro Mining Company. SEC Litig. Release No. 7120. On April 27, 1973 permanent injunctions were entered against Francis C. Lund and Robert Bryson, among others, from further violations of the fraud and registration provisions of the securities laws in an action involving securities of Northwest Pacific Enterprises, Inc. SEC Litig. Release No. 5890.

[28] On May 7, 1971 Medwin Benjamin pled guilty to one securities fraud count following the indictment of seven defendants in regard to the sale of securities of VTR, Inc. SEC Litig. Release Nos. 4265 and 5001. On August 4, 1973 an injunction was entered against nine defendants, including Medwin (Maurice) Benjamin, from further violations of the fraud and registration provisions of the securities laws in an action regarding securities of four companies sold through a registered broker-dealer. SEC Litig. Release Nos. 5118 and 6017.

[29] SEC Litig. Release Nos. 4389, 4609, 4614, 5000, 5204 and 6285.

3. Capitol Holding Corporation:[31] October 9, 1969 — Complaint filed charging violations of the fraud and registration provisions of the federal securities laws variously against twenty-three defendants including David A. Wooldridge, Daniel E. Manning, attorney Robert A. Eisenberg,[32] William G. Louzzo, aka William G. London, Irwin Schwartz, aka Steve Schwartz, Leslie Zacharias, aka Lee Zacharias, Bernard Klavir, Charles Murano, Robert M. Bryson[33] and R.F.S. Associates, Inc. Between October 10, 1969 and May 8, 1980 permanent injunctions were entered against these parties.

4. Les Studs Corporation:[34] July 9, 1970 — Complaint filed charging violations of the fraud and registration provision of the federal securites laws against J.H. Rapp Co., a registered broker-dealer, and Robert Rapp, the secretary-treasurer of J.H. Rapp Co., and charging violations of the registration provisions of those laws only against Leslie T. Zacharias, aka Lee Zacharias and John Elwood Dennett, among others. Permanent injunctions were entered against these parties between August 25, 1970 and June 16, 1971.

5. Picture Island Computer Corporation:[35] July 21, 1971 — Indictment brought by the New York Organized Crime Strike Force in conjunction with the United States Attorney for the Southern District of New York against John Lombardozzi, Peter Francis Crosby, Hilmer Burdette Sandine and Leslie T. Zacharias, among others, involving violation of the fraud and registration provisions of the federal securities laws, mail fraud and conspiracy. Named co-conspirators included Francis P. O'Neill and Byron E. Prugh. On June 9, 1972 Lombardozzi, Sandine and Zacharias were convicted; Crosby failed to appear for trial and was deemed a fugitive.

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[30] SEC Litig. Release Nos. 4141, 5182, 5775 and 5784.

[31] SEC Litig. Release Nos. 4434, 4448, 4496 and 4693.

[32] On February 22, 1972 Robert Eisenberg was enjoined from further violations of the securities laws in the matter of Majestic Capital Corporation. SEC Litig. Release No. 5334.

[33] On August 14, 1974 Robert Bryson was enjoined, along with Ted England, from further violations of the fraud and registration provisions of the securities laws in an action against eighteen defendants involving Royal Airlines, Inc. SEC Litig. Release Nos. 6361 and 6523.

[34] SEC Litig. Release Nos. 4675, 4792, 4793 and 5062.

[35] SEC Litig. Release Nos. 5096 and 5434.

D. PETER FRANCIS CROSBY

1. Texas Adams Oil Co., Inc.:[36] May 24, 1970 — Conviction of Peter Francis Crosby, among others, on charges of mail fraud, violation of the registration provisions of the federal securities laws, and conspiracy.

2. Jefferson Research Foundation, Inc. and Jefferson Custodian Fund, Inc.:[37] November 1, 1960 — Plea of guilty by Peter Francis Crosby to violating the fraud provisions of the federal securities laws in managing the assets of Jefferson Custodian Fund, Inc. which he controlled through acquisition of Jefferson Research Foundation, Inc.

3. American Continental Industries, Inc.:[38] December 2, 1968 — Complaint filed charging violations of the fraud and registration provision of the federal securities laws in the sales of securities against Michael LaMarca, Robert L. Taylor, Baptist Foundation of America, Inc., World Timberland Financial Corporation, Peter Francis Crosby, James Dondich, Nathan Rosenberg, Alessandrini & Co., Inc., a registered broker-dealer, Louis B. Meadows & Co., Inc., a registered broker-dealer, Philip S. Budin and Philip S. Budin & Co., a registered broker-dealer, among others. Permanent injunctions were entered against BFA, World Timberland, Crosby, Dondich, Rosenberg and Alessandrini & Co., Inc., among others. Undertakings not to engage in further violations were entered into by Budin and Budin & Co. November 20, 1972 — Indictment returned against Michael LaMarca, Robert L. Taylor and others.

4. Picture Island Computer Corporation: See C.5 above (1971-1972). Indictment of Crosby along with John Lombardozzi, Hilmer Burdette Sandine and Leslie Zacharias.

E. LOWELL M. BIRRELL

1. Swan-Finch Oil Corp.:[39] April 15, 1957 — Complaint filed charging violations of the registration provision of the federal securities laws against Lowell M. Birrell, Gerard A. Re, Sr., a specialist on the floor of the American Stock Exchange, Girard F. Re, Jr., Birnbaum & Co., a registered broker-dealer, Nahum Birnbaum, a partner in Birnbaum & Co., Norris Adams, Ltd., a Canadian broker-dealer, Josephthal & Co., a New York Stock Exchange and

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[36] SEC Litig. Release No. 1709.

[37] SEC Litig. Release No. 1825.

[38] SEC Litig. Release Nos. 4173, 4184, 4296, 5597 and 5636.

[39] SEC Litig. Release Nos. 1101, 1112, 1127, 2234, 2689 and 2741.

American Stock Exchange firm, Anthony J. Cordano, a partner in Josephthal & Co., Steven Randall & Co., Inc., a registered broker-dealer, Frank M. Naft, president of Steven Randall & Co., Inc., Tannen & Co., a registered broker-dealer, and Philip Tannen, president of Tannen & Co: April 2, 1962 — Indictment returned charging Gerardo A. Re, aka Jerry A. Re, Gerard F. Re, Lowell M. Birrell and others with conspiracy to violate the fraud and registration provisions of the federal securities laws. Gerardo A. Re and Gerard F. Re were convicted on July 11, 1963; Lowell Birrell was a fugitive.

2. United Dye & Chemical Corporation:[40] August 26, 1959 — Indictment returned against Alexander L. Guterma, Virgil D. Dardi, Lowell M. Birrell and others charging violations of the fraud and reporting provisions of the federal securities laws and conspiracy in regard to the sale of securities and in the exercise of proxies represented by those securities.

3. Doeskin Products, Inc..:[41] March 2, 1961 — Indictment returned charging thirteen defendants including Lowell M. Birrell, Samuel T. Smiley and Fred Tabah with violation of the fraud provisions of the federal securities laws and mail fraud, among other charges. As of April 19, 1961, a plea of guilty had been entered by Smiley and Tabah to certain of the fraud charges; Birrell was a fugitive.

4. American Leduc Petroleums, Ltd.:[42] July 20, 1961 — Indictment returned charging fourteen defendants including Lowell M. Birrell, J.A. Winston & Co., Inc., a registered broker-dealer, Joel Alfred Winston and eight securities salesmen with violations of the fraud and registration provisions of the federal securities laws, mail fraud and conspiracy. December 28, 1967 — Conviction of Birrell upon trial by jury.

5. Jeanette Minerals Limited:[43] October 3, 1961 — Indictment returned charging Lowell M. Birrell, and all of the defendants who were also charged in the indictment involving American Leduc Petroleums, Ltd., (see E.4 above) with conspiracy to violate the fraud and registration provisions of the federal securities laws, and mail and wire fraud statutes.

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[40] SEC Litig. Release No. 1485.
[41] SEC Litig. Release Nos. 1929 and 1991.
[42] SEC Litig. Release Nos. 2062 and 3897.
[43] SEC Litig. Release No. 2112.

Senator HATCH. Thank you.

Mr. Bookin.

Mr. BOOKIN. Mr. Chairman, my name is Daniel Bookin. I am a partner with the firm of Farella, Braun & Martel in San Francisco.

A great deal of attention has been paid to perceived abuses by civil litigants in private RICO actions. Certainly the gentlemen in the first panel today represented that point of view.

I would like to focus my testimony on legitimate uses of RICO, civil cases under RICO, to fight organized criminal activity. I first became acquainted with RICO when I served as an assistant U.S. attorney in the Southern District of New York.

Since that time, I have had the opportunity in private practice to represent both plaintiffs and defendants in private civil RICO actions. I have also had the opportunity, in particular, to represent Visa and MasterCard in bringing RICO actions against large credit card fraud schemes.

The conclusion that I have reached is that while there certainly have been abuses of private civil RICO, the statute also serves an important, legitimate function. I would urge the committee that in attempting to eliminate misuses of the statute that the committee not also eliminate proper uses.

The massive problem of credit card fraud in the United States and organized crime's participation in it are well-documented. This committee, in proposing the Credit Card Fraud Act of 1984, recognized the problem and organized crime's role in it.

Since the 1982 statistics upon which this committee relied, the problem of credit card fraud has grown, not diminished. Visa and MasterCard estimate that in 1984, credit card fraud with respect to them alone in the United States will exceed $219 million. That is a growth of 74 percent since just 1982 and over 1,700 percent since 1972.

There is no question that credit card fraud is a very serious problem in the United States. I think there also is no question that even the gentlemen on the first panel here today would agree that using civil RICO against credit card fraud schemes is a legitimate use of the statute.

In the past 2½ years, Visa and MasterCard have been very successful in bringing private RICO actions against credit card fraud. In fact, in the last 2½ years, some 10 suits have been brought. I describe those lawsuits in detail in my statement, but the frauds involved amounted to more than $30 million.

In each case, Visa and MasterCard were successful, and in each case the criminals were put out of businesses. Use of civil RICO by Visa and MasterCard provides a very important supplement to law enforcement efforts by Federal law enforcement agencies.

In each of the cases that Visa and MasterCard have brought, law enforcement agencies were aware of the activity that was going on and they were actively investigating them. The problem was that they were not able to obtain relief or criminal indictments with any speed at all.

In each of these cases in which I participated, we obtained injunctive relief within a matter of weeks and put these criminals out of business. The law enforcement investigations are still continuing. No indictments have been returned, no arrests have been made yet, although some of them have been continuing for 2 or 3 years.

Were it not for civil RICO, these criminals would still be in business, would still be defrauding the banks and the public in the United States.

In my prepared statement, I have suggested three proposals for modifying the RICO statute. First, I think it is very important that Congress clarify that injunctive relief is available under RICO. That has been the most important single facet of each of the cases that Visa and MasterCard have brought. There is some uncertainty in the courts about whether private injunctive relief is available. Congress should clarify that it is.

Second, I would suggest that Congress add credit card fraud and violations of the Credit Card Fraud Act as predicates under both criminal and civil RICO. Given organized crime's unquestionable participation in credit card fraud, it is an appropriate predicate offense.

Finally, I would make a suggestion outside of just amending RICO, and that is to create a private right of action under the Credit Card Fraud Act. If that were done, then Visa and MasterCard could fight credit card fraud without even having to resort to RICO and its attendant problems.

Thank you.

[The statement follows:]

STATEMENT OF

DANIEL H. BOOKIN
FARELLA, BRAUN & MARTEL
SAN FRANCISCO, CALIFORNIA

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to address the issue of possible amendments with respect to private RICO actions. While a tremendous amount of attention has been paid to perceived abuses by private litigants under RICO, little emphasis has been placed on legitimate uses of the statute to fight organized criminal activity. The focus of my testimony will be on the success that Visa and MasterCard have had in using RICO to combat the serious, nationwide problem of credit card fraud. Any amendment of RICO that would eliminate or inhibit this remedy would do a grave disservice to the public.

I first became acquainted with RICO when I served as an Assistant United States Attorney for the Southern District of New York from 1978 to 1982. During that time, I was assigned to the Organized Crime Unit and participated in a number of criminal RICO prosecutions and appeals. I personally prosecuted RICO cases involving organized crime's control of the New York waterfront and the Fulton Fish Market, where New York's wholesale fish industry is located. Although criminal RICO prosecutions were controversial when they first were brought, they are now generally recognized to be one of law enforcement's most effective weapons against organized crime.

Since leaving the United States Attorney's office, I have had the opportunity to bring private RICO actions and to defend against them. As a result, I have been able to obcerve uses of the statute firsthand from the perspective of both plaintiffs and defendants. In particular, I have represented Visa and MasterCard in a number of lawsuits in which they have successfully used RICO to sue perpetrators of major credit card fraud schemes. I also have followed closely judicial decisions regarding RICO, as well as the explosion of legal commentary concerning the statute. I have come to the conclusion that, while there have been abuses of the RICO private right of action, the statute also serves a legitimate and important function in fighting organized criminal activity. Care must be taken to insure that changes in the statute designed to eliminate misuses of RICO do not eliminate the appropriate and desirable uses as well.

I. ORGANIZED CRIME AND CREDIT CARD FRAUD

The massive problem of credit card fraud and organized crime's participation in it are well documented. In proposing the Credit Card Fraud Act of 1984, 18 U.S.C. § 1029, this Committee recognized the serious and ever-growing problem of credit card fraud. S. Rep. No. 98-368 (98th Cong., 2d Sess.). Losses from credit card fraud involving the major charge card companies increased from $11.7 million in 1972 to $125.8 million in 1982. Id. at 2. "While staggering, those figures do not reflect losses from private label bankcards, retail cards, gasoline cards, and travel and entertainment cards." Id. These losses are ultimately borne, in large part, by the innocent consumer. Id. at 3.

The problem of credit card fraud has grown, not diminished, since 1982. MasterCard and Visa estimate losses from credit card fraud in 1984 to be in excess of $219 million. This represents a 74 percent increase in fraud since 1982 and a 1,772 percent increase since 1972.

Organized crime is heavily involved in credit card fraud. This Committee's hearings in connection with the Credit Card Fraud Act demonstrated "that credit card counterfeiting and fraud have become favorite undertakings of traditional organized crime and new crime 'rings' formed specifically for this purpose." S.Rep. No. 98-368 at 4. Two examples cited in the Committee Report are as follows:

> "In New York, a seven-member family participated with 104 merchants in a fraudulent credit card scheme involving sales slips imprinted with account numbers

> from lost or stolen credit cards. Losses attributed to their operations are estimated at two million dollars. In a more recent operation financed by traditional organized crime elements, twenty-one persons were convicted of counterfeiting credit cards and $500,000 worth of card-making equipment was confiscated. The involvement of organized crime was underscored by the 'gangland'-type slaying of one of the persons involved in the operation."

Id. (Footnotes omitted.) "[P]rofits from credit card counterfeiting may be channeled by organized crime into its drug trafficking activities" and the evidence suggests "the involvement of criminal enterprises, rather than petty thieves and street criminals." Id. at 4. Finally, this Committee noted the inadequacy of state and local law enforcement to combat credit card fraud because of "the increasing sophistication and organized nature of these activities" and "the interstate and international aspects of the problem." Id. at 5. Recent prosecutions in New York, Miami and Los Angeles have continued to highlight the role of organized crime in credit card fraud.

Courts, legal scholars and witnesses before this Committee may differ as to exactly what activities Congress, in 1970, did or did not intend private RICO actions to reach. There can be no disagreement, however, that organized credit card fraud rings are wholly appropriate targets for civil litigants under RICO.

II. USE OF PRIVATE RICO ACTIONS TO COMBAT CREDIT CARD FRAUD

A. Civil RICO Actions Brought By Visa And MasterCard

Visa and MasterCard have been very successful in bringing private RICO actions against individuals and companies involved in massive, organized credit card fraud. Between May 1983 and late 1984, Visa brought seven lawsuits alleging violations of RICO growing out of credit card fraud. Since that time MasterCard and Visa have jointly brought three RICO actions against major credit card fraud operations. In each of those actions, access to the federal courts, nationwide service of process and subpoenas, treble damages, attorney fee awards and the availability of injunctive relief have been critical, if not determinative, factors in the decision to file suit. Indeed, none of the actions would have been brought at all if RICO did not exist.

These actions included three suits against individuals who used fraudulent credit cards or traveler's checks on a large scale, one against an individual who filed false applications and received over 100 credit cards that he used to obtain cash advances and to make large purchases, two against merchants who knowingly accepted counterfeit or blank credit cards for a percentage of the sales draft, and four against telemarketing enterprises that fraudulently obtained cardholder numbers and then billed the cardholders without their permission.

While difficult to state with certainty, estimates put the total losses suffered as a result of these schemes in excess of $32 million. This figure does not include the loss of public confidence in the credit card system and its attendant reduction in credit card use.

B. The Drisang Case

The utility and necessity of a private right of action under RICO are typified by a recent lawsuit in which I represented Visa, MasterCard and seven banks against a long-term, multi-state credit card fraud ring. Visa, MasterCard, et al. v. Drisang, et al., Docket No. 85-2627 PAR (C.D. Cal. filed April 23, 1985). The central figures in the scheme were Bernd Drisang and Edward J. Kane, who are both convicted felons then on federal probation in the Central District of California. The defendants' activities complained of in our lawsuit were the subjects of criminal investigations by the Federal Bureau of Investigation in California, Hawaii, Utah and Georgia, as well as an investigation by the Federal Trade Commission. MasterCard and VISA cardholders across the country had filed numerous complaints against the defendants with state and local law enforcement and consumer fraud agencies.

Between 1981 and 1984, the defendants processed and deposited well over $2.5 million worth of unauthorized charges to MasterCard and VISA cardholders. Using a long succession of corporate shells to conceal their activities and confuse banks and consumers, the defendants victimized at least eleven banks from Hawaii to Georgia. In central and southern California alone, the defendants deposited more than $1.9 million of unauthorized MasterCard and VISA charges at five different banks. The defendants also deposited approximately $83,000 of unauthorized sales drafts at a bank in Wyoming, approximately $302,000 of unauthorized sales drafts at a bank in Salt Lake City and approximately $258,000 of unauthorized sales drafts at three banks in Georgia. Scores of other VISA and MasterCard member banks around the country incurred hundreds of thousands of dollars of expenses in removing disputed charges from their victimized cardholders' accounts and obtaining reimbursement from the defendants' banks.

The defendants' scheme consisted of lying during thousands of interstate telephone solicitations made to MasterCard and VISA credit cardholders throughout the country from telephone "boiler rooms" in Los Angeles, Salt Lake City and Atlanta. The defendants and their accomplices purported to sell "travel club memberships." They tricked cardholders into disclosing their account numbers over the telephone by various methods, including statements or suggestions that defendants were somehow affiliated with MasterCard and VISA. The defendants asserted that they must have the cardholder's account number before sending the cardholder information, but promised that there would be no charge for the information. The defendants then manufactured and deposited VISA and MasterCard charge slips for transactions that never occurred, and the cardholder was billed for a charge that was never authorized.

The defendants deposited the fraudulent sales drafts into accounts they had opened at VISA and MasterCard member banks.

Under the credit card system, the defendants received immediate credit for these deposits as if they were cash. Because of the time it took for the unauthorized charges to be discovered, reported and rectified, the defendants were able to amass huge sums in their bank accounts in a short period and then withdraw most or all of the money before their bank discovered the fraud.

After the fraud was discovered, the defendants moved on to another bank, often using new corporate names, but following the same scheme. The defendants either created a new shell corporation or infiltrated a formerly legitimate business that had an existing bank account. In the latter case, the defendants "laundered" fraudulent sales drafts through the new business's bank account, looted the corporation and moved on to another victim.

The defendants' fraudulent activities caused untold losses, inconvenience and emotional distress to more than 15,000 consumers around the country who either paid for charges they never authorized or were forced to go through the time-consuming efforts necessary to remove unauthorized charges from their accounts. The injury suffered by these consumers was vividly documented in their thousands of written complaints, examples of which were excerpted in our court papers. Victimized cardholders felt so strongly about defendants' fraud that some two hundred of them executed declarations in support of our lawsuit.

VISA and MasterCard suffered irreparable damage from the defendants' pattern of fraud and their unauthorised use of the VISA and MasterCard trademarks. In addition to the costs resulting from the defendants' massive injection of fraudulent charges into the VISA and MasterCard systems, the good will and reputations of both organizations were seriously damaged. The defendants' illegal activities also caused consumers to lose confidence in MasterCard and VISA and to reduce their use of credit cards.

C. The Importance Of Civil RICO To Fighting Credit Card Fraud

The defendants' scheme in Drisang was nationwide with respect to both the perpetrators and the victims. Consumers and banks all around the country were defrauded. The defendants used or attempted to use credit card merchant bank accounts in Hawaii, California, Wyoming, Utah, Georgia, Florida and Pennsylvania. At the time of our lawsuit, key witnesses and defendants were spread throughout the country. It was only through RICO and the resulting availability of the federal courts and nationwide service of process and subpoena power that we were able to bring an effective lawsuit. By its nature, RICO allows the bringing of a lawsuit that presents a full picture of a criminal enterprise, in contrast to a state court fraud action encompassing only a segment of the overall scheme. We were able to obtain injunctive relief against the defendants within three days of filing our lawsuit. The injunctive relief remains in effect today.

I have been very impressed by the efforts of federal law enforcement agencies such as the Federal Bureau of Investigation and Secret Service against credit card fraud. They are dedicated, sophisticated and enthusiastic in their attempts to bring offenders to justice. Despite the diligence of these agencies, however, they often have been unable to obtain the quick and effective relief that MasterCard and Visa have accomplished through private RICO actions. The inability of law enforcement authorities to obtain speedy relief against sophisticated credit card fraud operations, such as the boiler room scheme described above, is due to a variety of reasons, including a lack of resources, the higher standard of proof required in criminal cases, and the Speedy Trial Act which makes United States Attorney's Offices reluctant to seek arrest warrants in complicated fraud cases before their case is fully developed.

Whatever the reason for the failure of federal law enforcement agencies to move quickly in credit card fraud cases, the fact remains that they often have not. The Drisang case is an excellent example. Although federal criminal investigations of Drisang were begun well before Visa and MasterCard commenced preparing their lawsuit, no indictments have yet been returned. In another case, Visa v. Curcio, Docket No. 83-4878 RHS (N.D. Cal. filed Oct. 19, 1983), Visa obtained injunctive relief against a fraudulent telemarketing scheme within two weeks of discovering the fraudulent nature of the scheme. Federal criminal investigations of one of the lead defendants in that case, which commenced in 1981, have yet to yield an arrest or indictment.

Another advantage of injunctions obtained under RICO against credit card fraud is the availability of contempt sanctions if the defendants continue their activities. For example, one of the defendants in Visa v. Curcio has recently been charged with criminal contempt for engaging in telemarketing in violation of the injunction entered against him. I have been appointed a special prosecutor by the court and expect to try the case this fall.

I could describe in detail numerous other successes that Visa and MasterCard have had in fighting credit card fraud through private RICO actions. These suits have provided a very important supplement to federal and state law enforcement efforts in this field. In other words, the lawsuits have fulfilled exactly the purpose Congress had in mind in enacting a private cause of action under RICO: the encouragement of "private attorneys general" to fight organized criminal activity through private lawsuits.

III. PROPOSALS TO MODIFY PRIVATE RICO ACTIONS

As this Committee is well aware, there have been numerous proposals to modify RICO with respect to private actions under the statute. Whatever other disadvantages many of the proposals may have, they would not adversely affect suits by MasterCard or VISA against those engaged in credit card fraud. Thus, I do not intend to discuss those changes in my testimony. Some suggested changes would be very detrimental to the type of suits that I have described and I strongly urge the Committee against adopting them. Other proposals may or may not inhibit effective suits against credit card fraud, depending upon how they are drafted and implemented.

A. Proposals That Would Seriously Impede Lawsuits Against Credit Card Fraud

1. Requiring A Prior Conviction

Requiring a prior conviction before allowing a private RICO action is the worst suggested amendment. This requirement would completely undermine the concept of private attorneys general. An important goal of the legislation is to encourage private litigants to supplement and, where appropriate, precede or even take the place of criminal prosecutions. To require the defendants to be convicted before they could be sued civilly would stand the theory on its head. None of the RICO actions against credit card fraud with which I have been associated could have been brought under a prior conviction requirement. As a result, these criminals would still be in operation and the public would still be being victimized by them.

2. Eliminating Wire And Mail Fraud As Predicate Acts

I also oppose removing wire fraud and mail fraud as predicate acts for civil RICO actions. These violations have formed the basis for each of the credit card fraud RICO cases in which I have participated. These crimes are the means by which banks and consumers have been bilked out of millions of dollars and, therefore, should be grounds for lawsuits to stop such conduct.

3. Requiring Proof Beyond A Reasonable Doubt

There is no reason that the burden of proof in a civil RICO action should be different from any other civil action. Requiring proof beyond a reasonable doubt could inhibit obtaining verdicts at trial and, especially, preliminary injunctive relief against credit card fraud schemes. This is particularly true in sophisticated schemes where the most culpable defendants often have insulated themselves from the members of their organization who deal directly with victims. In boiler room operations such as Drisang, a standard defense of the head of the ring is that he did not know that his telephone solicitors were making misrepresentations. Indeed, in most cases, higher-ups can produce documents in which they have instructed their telephone solicitors not to make misrepresentations. Thus, the evidence against the most culpable defendant usually will be circumstantial.

If a judge or jury must find the defendant's guilt beyond any reasonable doubt, they may hesitate even though they would have no reluctance in finding the defendant guilty by a preponderance of the evidence. The preponderance of the evidence standard provides sufficient safeguards for defendants in thousands of civil causes of action in the United States, including those which award punitive or treble damages. RICO should be no different.

4. Requiring An "Organized Crime" Connection

No "organized crime" connection should be required. As Congress concluded when it enacted RICO and as the courts have echoed, such a requirement would be unworkable and probably unconstitutional. Moreover, we must remember that La Cosa Nostra is but one variety of organized crime. Any criminal enterprise that is on-going, has a hierarchy and involves multiple participants may be organized criminal activity. Such organizations are very dangerous and should be stopped by whatever legal means of criminal or civil enforcement are available. Serious injury also may result from criminal ventures that do not qualify as "organized" crime. This criminal conduct also should be deterred and injuries stemming from it also should be redressed.

B. Proposals That May Impede Lawsuits Against Credit Card Fraud

1. Amending The Definition Of "Pattern"

Proposals that may or may not interfere with the effectiveness of RICO against credit card fraud include suggestions that the pattern element of RICO be defined to require that underlying predicate offenses arise in two or more separate and distinct criminal episodes. If this definition would eliminate RICO suits stemming from two fraudulent mailings or telephone calls in connection with a single transaction such as a contract between two parties, the amendment would be a good one. If, on the other hand, the provision were interpreted to deny relief against a dishonest "boiler room" operator or counterfeiting ring which makes unauthorized credit card charges to thousands of cardholders as part of the same scheme, I would oppose it vigorously. A defendant who uses the same technique to defraud numerous separate individuals in separate transactions, even if all the separate actions could be viewed as one major "episode," should be held accountable under RICO.

2. Requiring "Competitive" Or "Racketeering" Injury

Limiting RICO suits to instances of "competitive injury" or "racketeering injury" could also needlessly impede lawsuits by MasterCard and Visa. In the suits MasterCard and Visa have brought to date, they have been able to allege that they suffered injury from the "pattern" of racketeering in addition to the direct effect of the underlying predicate acts. Large-scale, repeated acts of fraud against thousands of Visa and MasterCard cardholders cause injury to Visa and MasterCard and their members to a greater degree and in a different manner than would be suffered if the defendants had limited themselves to isolated acts of fraud. The widespread pattern of fraud in these cases causes consumer mistrust of, loss of confidence in, and ill will toward Visa, MasterCard and their members over and above that which would have been caused by the individual predicate acts themselves. Despite the ability of Visa and MasterCard to fit within the "racketeering injury" definition, such a requirement is unnecessary, confusing and often counter to the proper goals of RICO. The injury that should be redressed by RICO actions is any injury that naturally flows from the crimes being perpetrated, not merely secondary or indirect injury stemming from the fact that more than one crime has been committed.

C. Proposals That Should Be Enacted

1. Adding Credit Card Fraud As A Predicate Act

I would suggest several changes to enhance the effectiveness of RICO against credit card fraud. First, violation of the Credit Card Fraud Act of 1984, 18 U.S.C. § 1029, should be made a predicate act for both criminal and civil RICO. As set forth above, organized crime is heavily involved in credit card fraud. Including the Credit Card Fraud Act as a predicate would substantially further the goal of fighting organized crime.

2. Clarifying The Availability Of Injunctive Relief

RICO should be amended to make it clear that injunctive relief is available in private RICO actions. Although some courts have granted injunctive relief under RICO, other courts have indicated that such relief is not available to private litigants under the statute. Compare Aetna Casualty and Surety Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983), aff'd, 730 F.2d 905 (2d Cir. 1984) with Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983). Private litigants do not require the broad, equitable relief available to the government such as divestiture, but do need the ability to seek both preliminary and permanent injunctive relief necessary to prevent future violations of the Act. I can say without hesitation that the injunctive relief obtained by Visa and MasterCard in their civil RICO actions has been the single most important result of these cases. The most effective way to protect the public from credit card fraud -- short of sending the perpetrators to jail -- is to enjoin them quickly and permanently from engaging in similar conduct in the future. If the defendants violate the injunction, then they will go to jail.

3. Creating A Private Right Of Action For Violations Of The Credit Card Fraud Act

The most effective added deterrent to credit card fraud would be for Congress to enact a private right of action for violations of the Credit Card Fraud Act of 1984. 18 U.S.C. § 1029.1/ If MasterCard and Visa were able to sue in federal court for violations of the Credit Card Fraud Act, they would not need to rely on RICO to bring such actions. Such a right of action would have the advantage of allowing effective redress against perpetrators of credit card fraud, without having to meet the various and sometimes complicated elements of RICO. The goals of the Act will be greatly advanced by supplementing criminal enforcement with civil enforcement as well. Until such a private right of action is enacted, however, it is essential that the relief against credit card fraud currently available

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1/ Section 1029, in substance, makes it illegal to use with intent to defraud counterfeit or unauthorized access devices or equipment for making access devices or counterfeit access devices. The term "access device" includes credit cards, account numbers or other means of account access that can be used to obtain money, goods, services or any other thing of value, or that can be used to initiate a transfer of funds.

under RICO not be eliminated or inhibited. Whatever other problems may have stemmed from private actions under RICO, the statute serves its intended goal in the area of credit card fraud and is extremely important in the fight against this ever-growing area of organized crime.

Senator HATCH. Thank you.

We will note that Senator Denton was here for a while but had to leave for another committee meeting. We are happy to have Senator McConnell, who plays a very important role on the committee, here with us.

Senator, do you have any questions for this panel?

Senator MCCONNELL. I am sorry, Mr. Chairman. I just arrived and I do not, but I would like to put a statement in the record at this point, if I may.

Senator HATCH. Without objection, we will place your statement in the record immediately following Senator Thurmond's and Senator Denton's.

Let me just ask you gentlemen this question. We will start with you, Mr. Silbert, and just go across the table. Are you sympathetic at all with the observation that the label of "racketeer" is not appropriate within the context of commercial litigation?

Mr. SILBERT. I am sorry, Senator. Could you repeat that? I did not quite hear the entire question.

Senator HATCH. Are you sympathetic at all with the observation that the label "racketeer" is not really appropriate in the context of commercial litigation?

Mr. SILBERT. In my testimony here before, Senator, and in our prepared statement we suggested that the use of "racketeer" does not really further any legitimate purpose that we can see for use of the statute. It just raises connotations and suggestions and emotions that do not really further the resolution of litigation either from a plaintiff's point of view or a defendant's point of view.

It does not necessarily identify the kind of activity; if you are talking about fraud, fraud is fraud and you do not have to label a person who commits a fraud under a particular statute as a racketeer.

So our view is, as we stated, even if it means changing the acronym of the statute, we see no useful purpose in retaining that particular label.

Senator HATCH. Thank you.

How about you, Mr. Bertz?

Mr. BERTZ. I would respond similarly, with the added comment that I see no reason to limit the Senator's question to cases involving commercial fraud. The statute is dealing with egregious, continuous, repetitive patterns of criminal conduct, however you want to title it.

The word "racketeer" in any case can have effects on the conduct of that case that can multiply the time and divert the attention of the trier of fact from the gut issues in the matter.

Senator HATCH. Well, thank you.

Mr. Bookin?

Mr. BOOKIN. Mr. Senator, I would say that use of the term is sometimes appropriate in commercial litigation because sometimes racketeers are involved in commercial litigation. I do not think that it is necessary to be a part of the statute, and I certainly think that it would be a good suggestion to eliminate use of the word from the statute.

In fact, if I were a plaintiff's attorney and I were on trial, I would not want the jury to feel that it had to find that the defendant was a racketeer in order to find for the plaintiff.

Senator HATCH. I could see a good defense attorney making an argument that this was a misuse of the term and that there is only one reason it is misused. That is because it is an unjust case. Maybe I have been in too much litigation myself through the years.

Let me ask you another question, and that is this: To what do you attribute the meteoric rise in the number of civil RICO cases or filings after many years of silence in this civil RICO area? What do you attribute the rise to?

Mr. SILBERT. That is a hard question to answer, Senator.

Senator HATCH. Come on now; let us not protect the profession here.

Mr. SILBERT. It is not that. I think the statute was enacted in 1970 and even its criminal use, as I think the statistics would reflect, began comparatively slowly. Frankly, sometimes the bar is slow to pick up on certain matters that are available to it.

RICO, with its label of racketeering, was, I suspect, initially thought by members of the bar to be related to organized crime. RICO was supposedly directed primarily at organized criminal elements.

I think the bar eventually, at least from my discussion with colleagues, began to think more and more of the potential use of that statute as it applied in other areas. As the Department of Justice study shows and the ABA study shows, RICO, not intentionally directed at fraud activities, began to be seen as a vehicle in that area both in the criminal area and as an aftermath in the civil area.

Of course, it is in the civil area that it has been most heavily applied as to fraud. I think it is a question of the bar waking up. Some people were very conscious about RICO's use, advocating its increased use, and it gained its present notoriety.

Senator HATCH. Thank you.

Mr. Bertz.

Mr. BERTZ. A few factors. First of all, I think the comments made in the written submission on behalf of the Association of Attorneys General and Association of District Attorneys that this law is not that much different than other laws, looking back particularly to antitrust and securities laws in their development, is quite important. Therefore, this is not necessarily an unusual phenomenon.

I would also refer again, as Mr. Silbert did, to the title of the act. It puts people off, and certainly it may have stopped many attorneys from looking at the preamble to the act, in which fraud was one of the three basic areas that Congress noted was of import in dealing with this statute and promulgating this statute, and then further on in that same statement noting that harm to investors is one of the very basic concerns that Congress had in passing the statute. That has been overlooked quite a bit in the attacks and in the statements of what criminal activity is that is typical to organized crime.

A third matter: I just do not think that until things develop, the costliness in terms of actual dollar cost and in terms of risk to your case are able to be considered very well.

I know in the 1974–75 prosecution of one of the cases that is in the study that I report that I was a part of, although we viewed RICO for that criminal prosecution, we left it out because various issues had not been significantly developed and we felt that that would confuse a jury in an otherwise potentially confusing case.

Now that definitions and other issues are being resolved to at least some extent, cases can go forward where they are real cases, and rule 11 and hopefully other procedures will weed out those that are not.

Senator HATCH. Thank you.

Mr. Bookin.

Mr. BOOKIN. I agree with Mr. Silbert. When I was in the U.S. Attorney's Office, even though it was 10 years after the enactment of the criminal RICO statute, prosecutions were still relatively new and were still controversial.

It has been only within relatively recent times that organized crime families have been named as the enterprise of criminal RICO prosecutions, and just this year that the Crime Commission of La Cosa Nostra in New York has been named.

With respect to use on the civil side, I do not think it is because lawyers have become more greedy in recent times. I believe that, as Mr. Silbert said, there is a certain lag in education.

Senator HATCH. Thank you. I might say that I am not so sure it was ever expected to be used that way. All of you have been very helpful to the committee today. I want to thank you for appearing before the committee and we appreciate the efforts that you have put forth to be here and help us.

Mr. BERTZ. Thank you very much, Senator.

Mr. BOOKIN. Thank you, Senator.

Senator HATCH. Thank you so much for appearing before the committee.

Our final panel will be Mr. David Albenda, of the American Council of Life Insurance here in Washington, DC; Irv Nathan, Esq., of Arnold & Porter in Washington, DC, who will be testifying on behalf of the property and casualty insurance industry; and Larry E. Parrish, Esq., Parrish & Mulrooney, a professional corporation out of Memphis, TN.

We are happy to have you gentlemen with us here today. I might say that if Congress reformed civil RICO by requiring a prior criminal conviction or amending the list of predicate offenses, commercial defrauders would still be subject to criminal prosecution under RICO, and the Department of Justice has indicated its intent to pursue these criminal cases.

Moreover, these defrauders would be subject to common law actions which would almost invariably include severe punitive damages. If civil RICO is reformed to remove Federal treble damage claims against legitimate businesses, it seems that criminal activity will be stopped by RICO and State law.

In fact, many states now have their own mini-RICO statutes to add another layer of protection against commercial fraud. I think that needs to be placed in the record at this hearing today.

Let us begin with you, Mr. Albenda, and then go to Mr. Nathan and then to Mr. Parrish.

STATEMENT OF A PANEL CONSISTING OF: DAVID ALBENDA, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NEW YORK LIFE INSURANCE CO., ON BEHALF OF THE AMERICAN COUNCIL OF LIFE INSURANCE, WASHINGTON, DC; IRVIN B. NATHAN, ARNOLD & PORTER, WASHINGTON, DC, ON BEHALF OF THE PROPERTY AND CASUALTY INSURANCE INDUSTRY; AND LARRY E. PARRISH, PARRISH & MULROONEY, MEMPHIS, TN

Mr. ALBENDA. Thank you, Mr. Chairman. Mr. Chairman and members of the committee, my name is David Albenda. I am senior vice president and general counsel of New York Life Insurance Co. I appear today on behalf of the American Council of Life Insurance. I am here today with Bob McConnaughey, associate general counsel of the council.

We appreciate the opportunity to testify before you concerning the urgent need to amend the private civil treble damage provisions of RICO. The civil liability provisions of RICO were intended by Congress to protect legitimate businesses from infiltration by organized crime.

Unfortunately, private civil RICO has not been used against organized crime. Private civil RICO has been used almost exclusively in conventional business and commercial litigation.

Most civil RICO suits are simply efforts by one party to a business dispute to extort a favorable resolution of the dispute by threatening the other party with treble damages, plus costs of litigation, plus attorneys' fees.

RICO casts aside the delicate balance of State and Federal statutory and common law developed over decades for the resolution of business disputes. It permits disputes that would not support a breach of contract claim or a fraud claim under State law to be brought as a treble damage action in Federal court.

It permits securities disputes that would not support a cause of action for single damages under the Federal securities laws to be brought in the Federal courts for treble damages.

Life insurance companies encounter civil RICO in various situations. For example, life insurance companies are one of the primary sources of business capital investment in the U.S. economy.

In 1984, life insurance companies' net investments in the U.S. capital markets totaled $54 billion. The amounts of loans represented by these in individual cases are very large indeed, totaling individually in the tens of millions of dollars.

The potential for liability to insurance companies in individual transactions, therefore, because of the treble damage provision is in the hundreds of millions of dollars in some cases.

A life insurance company may loan money to an enterprise which, because of incompetence, bad luck, or fraud, fails. Disappointed investors and others involved with the enterprise often look for someone to sue to recover losses.

Often, those involved in the management of the enterprise whose incompetence or fraud resulted in its failure are judgment-proof. The frustrated plaintiffs and their counsel look for a deep pocket to include as a defendant to make a lawsuit worthwhile. Often, the insurance company—in reality, one of the victims of the management's incompetence or fraud—is the only deep pocket in sight.

Courts have been reluctant to dismiss such deep-pocket defendants even though they did not participate in the management of the business.

Another situation in which life insurance companies are likely to become RICO defendants is the situation where a company has sold an insurance product, usually a life insurance or annuity contract, and later, for whatever reason, the purchaser of the product is dissatisfied.

This type of RICO suit is not unlike those encountered by security broker-dealers sued under RICO by customers dissatisfied with their securities investments.

It has been contended that there are only a limited number of reported RICO decisions and RICO cases filed in Federal court. Thus, it is argued civil RICO is not really much of a problem.

As any litigator knows, the number of reported decisions and even the number of cases filed indicate only the tip of the iceberg. For every complaint that is actually filed, and certainly for every reported decision, there are hundreds of disputes resolved without litigation.

Civil RICO affects not only the disputes that are actually brought to court, but also significantly affects the resolution of those disputes that are normally resolved without resort to litigation.

Also, the use of civil RICO is increasing at an enormous rate. Indeed, it has been our experience that a number of complaints filed prior to the *Sedima* decision have been amended since that decision to include RICO counts.

When it was suggested in the July 31 hearings before this committee that no defendant would settle a RICO suit of questionable merit for anything more than nuisance value, Senator Hatch, referring to his experience as a litigator, quickly dispatched this argument as naive. Defendants frequently settle cases, although they know the plaintiff's case is of dubious merit. The reasons vary from case to case, but invariably reflect a determination that despite the questionable merit of the plaintiff's case, the time, disruption and expense, as well as the risk, outweigh the settlement amount.

Amendment to RICO should be governed by three general principles. One, the amendment of private civil RICO should be separate from modifications of the criminal provisions. Two, only victims of organized, substantial, and persistent criminals should be entitled to recover treble damages for their injuries. Three, any amendment to private civil RICO must clearly distinguish between private claims which may not be brought under RICO and those which may.

It is important to maintain consideration of private RICO issues separate from consideration of modification of RICO's criminal provisions. Most of the recommendations for amendment to criminal RICO are in the nature of adjustments and fine-tuning to a statute that has proved extremely successful in performing the functions intended for it by Congress.

Private civil RICO, on the other hand, is a statute which has not been used as Congress intended. It has been turned on its head and rather than protecting legitimate businesses from infiltration by organized crime, private civil RICO is the weapon of choice for disgruntled plaintiffs seeking to ameliorate the results of unfortunate business decisions.

Although thoughtful modification of criminal RICO may be appropriate, the problems of private civil RICO are so significant and so rapidly expanding that Congress should not delay appropriate amendment of civil RICO to consider possible refinements to criminal RICO.

Most important, the amendment to RICO should make clear the distinction between private claims which may be brought under RICO and private claims that are not eligible. The amendment should establish a bright line test so that inappropriate cases will not be brought or can be dismissed early in the proceeding.

The principal problem with RICO, as currently interpreted, is the difficulty in determining the distinctions, if any, between a legitimate RICO claim and an ordinary business dispute.

A number of suggestions have been offered for amendment of civil RICO that would meet the requisite principles. The most direct and effective of these suggestions is the prior criminal conviction requirement contained in H.R. 2943. The life insurance industry supports that bill as the most effective means of dealing with abuse of the civil liability provisions of RICO.

A prior conviction requirement may be appropriately limited to private suits. No such limitation need be placed on suits by the Federal Government or State governments. The Federal Government has acted responsibly in administering both the criminal and civil provisions in RICO. We would expect State authorities to be similarly responsible in utilizing civil RICO.

At hearings before the Subcommittee on Criminal Justice of the House Judiciary Committee held on September 18, 1985, the representative of the U.S. Department of Justice indicated his belief that the Department could support H.R. 2943, the prior criminal conviction bill, if it were amended to include an exemption from the prior criminal conviction provision for the Federal Government and State governments. We have no objection to such a limitation of the prior criminal conviction provision so long as appropriate administrative and procedural guidelines are observed in Government civil RICO suits.

A second possibility that would meet the requisite criteria is contained in Senate bill 1521. This bill would require that a private civil RICO claim would require at least one act of racketeering other than mail fraud, wire fraud or securities fraud. We also support this as being an adequate attempt to resolve the problem.

Whichever route is chosen, in light of RICO's purpose to protect legitimate businesses from criminal activity, it is important to clearly limit the circumstances under which legitimate businesses may be held liable under civil RICO for acts of employees and agents.

Under civil RICO, treble damage liability of employers for the acts of employees and agents should be allowed only when the employer can fairly be accused of wrongdoing.

Senator HATCH. Mr. Albenda, let us put the rest of your statement in the record. It is an excellent statement and we appreciate the efforts you have gone to to give it.

Mr. ALBENDA. I appreciate the opportunity to be here, sir.

Senator HATCH. You have made an excellent contribution.

[The statement follows:]

STATEMENT OF THE
AMERICAN COUNCIL OF LIFE INSURANCE
BEFORE THE
SENATE JUDICIARY COMMITTEE

DELIVERED BY DAVID ALBENDA

September 24, 1985

Mr. Chairman, members of the Committee, my name is David Albenda. I am Senior Vice President and General Council of the New York Life Insurance Company, and I appear today on behalf of the American Council of Life Insurance. The 627 life insurance company members of the Council represent nearly 95% of the life insurance in force in the United States, approximately 95% of the assets of all United States life insurance companies, and more than 96% of the insured pension business. We appreciate the opportunity to testify before you concerning the urgent need to amend the civil treble-damage provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). We believe it is imperative for Congress to respond promptly to the invitation by the Supreme Court in the Sedima case to amend civil RICO to restore its use as a weapon against organized crime and to limit its use in conventional business and commercial disputes.

Life Insurance Companies Have a Significant Interest In Amendment Of Civil RICO

Life insurance companies, like other businesses, become involved in commercial disputes. Some of these disputes result in litigation. More and more, life insurance companies encounter civil RICO in such business disputes and litigation. In light of experience with civil RICO, life insurance companies have concluded that civil RICO today is most often employed as a tool for extortion against the legitimate businesses it was intended to protect, a result not anticipated by the Congress at the time it passed the statute. This use of civil RICO destroys the delicate balance developed by the common law and state and federal legislation over decades. This balance must be restored.

Life insurance companies are likely to encounter civil RICO in various situations. For example, a life insurance company may loan money to an enterprise which, because of incompetence, bad luck, or fraud, fails. Disappointed investors and others involved with the enterprise often look for someone to sue to recover losses. Often, those involved in the management of the enterprise, whose incompetence or fraud resulted in its failure, are judgment-proof, if available at all. In this situation, the frustrated plaintiffs and their counsel look for a "deep pocket" to include as a defendant to make a lawsuit worthwhile. Often, the insurance company, in reality one of the victims of the management's incompetence or fraud, is the only deep pocket in sight. Under the broad interpretation given RICO, courts have been reluctant to dismiss such deep pocket defendants merely because they did not participate in the management of the business.1/

Another situation in which life insurance companies are likely to become RICO defendants is the situation where the company has sold an insurance product, usually a life insurance or annuity contract, and later, for whatever reason, the purchaser of the product is dissatisfied. This type of RICO suit is not unlike those encountered by securities broker-dealers sued under RICO by customers dissatisfied with their

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1/ E.g., Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), aff'd en banc 710 F.2d 1361 (8th Cir. 1982), cert. denied sub nom. Prudential Ins. Co. of America v. Bennett 104 S. Ct. 527 (1983); Bennett v. Berg, ___ F. Supp. ___, Civ. Action Nos. 80-0381-CV-W-0 and 80-0459-CV-W-0 (W.D. Mo., Western Div., June 21, 1984 - opinion of Judge Roberts entitled "Order on Consolidated Motions.")

securities investments.2/

Life insurance companies are one of the primary sources of business capital investment in the United States economy.3/ Life insurance companies also sell large amounts of life insurance and annuity products. In these capacities and others life insurance companies are vulnerable to RICO suits. We believe that legislation must be passed that effectively forecloses the use of civil RICO as a litigation tool in ordinary business and commercial disputes.

Recommendations Regarding Amendment of RICO

With regard to amendment of RICO, we substantially concur with the suggestions presented to the Subcommittee on Criminal

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2/ Otto v. Variable Annuity Life Ins. Co., No. 82 C 4762 (N.D. Ill., Eastern Div. April 11, 1985). Plaintiff, a school teacher, sued an insurance company on behalf of herself and a class including other teachers who participated in the insurance company's fixed annuity program. Plaintiffs alleged that the fixed annuity was a security and that defendants had unlawfully failed to disclose certain information in violation of the anti-fraud provisions of the federal securities laws. The plaintiff also alleged mail fraud. On the basis of the mail fraud and securities fraud allegations, the plaintiff claimed treble damages under RICO. The District Court determined that the fixed annuity in question is not a security. On this ground and others the court dismissed the securities fraud and RICO counts of the complaint.

3/ Net investment in U.S. capital markets by life insurance companies totaled $54.2 billion in 1984. Life Insurance Fact Book - 1985 (American Council of Life Insurance).

Justice of the House Judiciary Committee by the property and casualty insurance industry in testimony delivered on July 24, 1985. Amendment to RICO should be governed by three general principles:

1. Amendment of private civil RICO should be separate from modification of the criminal provisions;
2. Only victims of organized, substantial, and persistent criminals should be entitled to recover treble damages for their injuries; and
3. Any amendment to private civil RICO must clearly distinguish between private claims which may be brought under RICO and those that may not.

It is important to maintain consideration of private civil RICO issues separate from consideration of modification of RICO's criminal provisions. Most of the recommendations for amendment to criminal RICO 4/ are in the nature of adjustment and fine tuning of a statute that has proved extremely successful in performing the functions intended for it by Congress.5/ Private civil RICO, on the other hand, is a statute which has not been used as Congress intended. It has been turned on its head and, rather than protecting legitimate businesses from

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4/ E.g., American Bar Association, Report on RICO (1982) and A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation, A report of the RICO Cases Committee of the American Bar Association Criminal Justice Section (April 18, 1985).

5/ Statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, before the Senate Judiciary Committee (May 20, 1985) (hereinafter, "DOJ Testimony"), 2-13.

infiltration by organized crime, has been used by plaintiffs to sue the legitimate businesses intended as the beneficiaries of the statute. Instead of providing financial relief for victims of organized crime whose interests the government could not fully redress merely by indicting and convicting the racketeers, private civil RICO is the weapon of choice for disgruntled plaintiffs seeking to ameliorate the results of unfortunate business decisions. Although thoughtful modification of criminal RICO may be appropriate, the problems of private civil RICO are so significant and so rapidly expanding that Congress should not delay appropriate amendment of civil RICO to consider possible refinements to criminal RICO.

Only victims of organized, substantial, and persistent criminals should be entitled to recover treble damages for their injuries. It is clear from the legislative history of RICO that Congress intended to protect legitimate business from organized crime. The statute was drafted broadly in reliance upon the prosecutorial discretion of the Department of Justice. When civil RICO was added, practically as an afterthought, little consideration was given to the fact that no prosecutorial discretion could be expected from civil plaintiffs. There is nothing to suggest that Congress intended to substitute RICO as a remedy for all activities that might be reached through common-law fraud actions or that Congress intended to provide a treble damage cause of action for limited incidents of mail fraud or wire fraud. Similarly, there is no evidence that Congress intended to replace the existing express and implied private causes of action under the federal securities laws. We agree with the statement of two advocates of an expansive application of civil RICO that "there is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers."6/ However, before a civil RICO action should be permitted against legitimate businessmen, it should be clear they have acted as racketeers. Private civil RICO should be reserved for offenses committed by organized crime or offenses of the type committed by organized crime that Congress has determined merit the extraordinary remedy of treble-damage recovery.

Most important, the amendment to RICO should make clear the distinction between private claims which may be brought under RICO and private claims that are not eligible. The amendment should establish a bright-line test so that inappropriate cases will not be brought or can be dismissed early in the proceeding. The principal problem with RICO as currently

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6/ Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies, 53 Temple L.Q. 1009, 1029, n. 91.

interpreted is the difficulty in determining the distinctions, if any, between a legitimate RICO claim and an ordinary business dispute.

A number of suggestions have been offered for amendment of civil RICO that would meet these requisite principles. The most direct and effective of these suggestions is the prior criminal conviction requirement contained in H.R. 2943, the bill introduced by Representative Boucher. The life insurance industry supports H.R. 2943 as the most effective means of dealing with abuse of the civil liability provisions of RICO. Such a prior criminal conviction requirement would be consistent with the intent of Congress to provide financial relief for victims of organized crime whose interests the government could not fully redress merely by indicting and convicting the criminals, and plaintiffs would clearly have suffered the type of injury RICO was enacted to combat. A prior criminal conviction requirement for private suits would eliminate the employment of RICO against legitimate businesses in ordinary commercial disputes.

A prior criminal conviction requirement would also assure that defendants in RICO cases have been accorded the procedural and due process rights accorded to criminal defendants. The defendant's guilt would be established beyond a reasonable doubt. The prior criminal conviction requirement for private civil RICO suits would effectively narrow the civil liability provisions of RICO without limiting criminal RICO. Civil RICO trials would be abbreviated because most of the relevant facts would be established in the criminal trial.

A prior criminal conviction requirement may be appropriately limited to private suits. No such limitation need be placed on suits by the federal government or state governments. The federal government has acted responsibly in administering both the criminal and civil provisions of RICO. We would expect state authorities to be similarly responsible in utilizing civil RICO. At hearings before the Subcommittee on Criminal Justice of the House Judiciary Committee held September 18, 1985, the representative of the United States Department of Justice indicated his belief that the Department could support Representative Boucher's prior criminal conviction bill if it were amended to include an exemption from the prior criminal conviction provision for the federal government and state governments. We have no objection to such a limitation of the prior criminal conviction provision, so long as appropriate administrative and procedural guidelines are observed in government civil RICO suits. The problem with civil RICO is its unrestrained use by private plaintiffs in ordinary business disputes. As we discuss below, the federal government has placed responsible limitations on its use of RICO, but there are no such limitations on private counsel.

Objections have been raised to implementation of a prior criminal conviction requirement on the ground that such a requirement will reduce the role of "private attorneys general" in filling prosecutorial gaps resulting from the government's limited resources. Opponents of RICO reform point to the fact that most anti-trust cases are instituted by private plaintiffs. The fact is, however, that the civil provisions of RICO have, understandably, not produced a single civil RICO action against an organized crime figure prior to conviction. The theoretical possibility that civil RICO might be used as a weapon against crime, organized or otherwise, should be weighed against the obvious and increasing abuse of civil RICO in suits against legitimate businesses in conventional business disputes.

Another possibility is suggested by Representative Conyers' RICO reform bill, H.R. 2517. Though this bill does not focus specifically on civil RICO issues, it would require a prior criminal indictment or information as a precondition to a private civil treble damage action. Though not providing potential RICO defendants with the procedural and constitutional protections provided under the prior criminal conviction requirement, such a requirement would protect potential defendants from indiscriminate use of civil RICO by interposing prosecutorial discretion. Also, a prior indictment or information requirement would not impose unacceptable delays upon the institution of private civil suits. Because of the urgent need for reform of civil RICO, and the relative success of criminal RICO, consideration of civil RICO reform should be kept separate from any proposed criminal RICO reform.

A third possibility that would meet the requisite criteria is contained in Senate Bill 1521 introduced by Senator Hatch. This bill would require that a private civil RICO claim would require at least one act of racketeering other than mail fraud, wire fraud, or securities fraud. In other words, a private civil RICO count must involve at least one predicate act in addition to mail fraud, wire fraud, or securities fraud. This requirement would eliminate the vast majority of the private civil RICO claims made against legitimate businesses and would avoid many of the concerns expressed with regard to a prior criminal conviction or prior indictment requirement.

Several other responsible recommendations for private civil RICO reform have been made that would meet the requisite criteria. One would prohibit private civil RICO actions where the predicate acts of racketeering alleged are mail, wire, or securities fraud. Such an amendment would substantially eliminate abusive use of private civil RICO in conventional business disputes. Another related suggestion would prohibit private civil RICO actions where the predicate acts charged are mail, wire, or securities fraud, unless there was a prior criminal conviction. Pursuant to this suggestion, private actions could be brought under civil RICO without prior conviction utilizing the more traditional "racketeering" predicate offenses.

In light of RICO's purpose to protect legitimate business from criminal activity, we feel compelled to make one final point. The Council agrees with the American Bar Association's Civil RICO Task Force [7] that it is important to clearly limit the circumstances under which legitimate businesses may be held liable under civil RICO for the acts of employees and agents. Under civil RICO, treble-damage liability of employers for the acts of employees and agents should be allowed only when the employer can fairly be accused of wrongdoing. Any amendment of civil RICO should preclude derivative liability except in those circumstances where high level managers have either knowingly participated in the predicate acts or have knowingly disregarded the existence of such wrongdoing by employees or agents.

Under existing law an employer is generally liable for the acts of its employees or agents within their "apparent authority." Though several recent cases have concluded that the doctrine of respondeat superior must be rejected in RICO cases because it would "contravene the requirement of a separate person and enterprise contained in the statute and case law,"8/, the law on employer liability under RICO is unsettled, varying from court to court.9/ This important issue should not be left to haphazard judicial development.10/

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[7] Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking, and Business Law (hereinafter the "ABA Report"), Chapt. 13, 348-365.

Because the essential purpose of RICO is to protect legitimate business from criminal activity, Congress should add to RICO a provision limiting the treble damage liability of corporations and other entities on a respondeat superior or other derivative liability basis. While ordinary federal civil rules of derivative liability should continue to govern a business entity's liability for single damages for the torts of its employees and agents, liability for treble damages should not be subject to the same criteria. For example, an insurance

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8/ Addis v. Moser, No. 83 C 6118 (N.E. Ill, Feb. 15, 1984). Accord, Bennett v. United States Trust Co. of New York, ____ F.2d ____ (2nd Cir., August 9, 1985).

9/ Id.; Compare, Bernstein v. IDT Corp., 582 F. Supp. 1079 (D. Del 1984) (doctrines of apparent authority and respondeat superior are applicable in RICO cases), with Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1982) (respondeat superior inappropriate in RICO case where management had no knowledge). Indeed, different courts in the same district differ on this issue: compare Parnes, supra. with In re Olympia Brewing Co. Securities Litigation, No. 77 C 1206 (N.D. Ill. Dec. 18, 1984).

10/ Accord, ABA Report at 360.

company should not be subject to treble damages for activities of an agent where there is no direct criminal involvement of high-level managing agents or top officers or directors and where there has been no knowing disregard of the offending activities by such high-level managing agents and officials. As the ABA Task Force suggests, in these circumstances the business, though perhaps subject to single damages, should not be subject to treble damages.11/

There is recent precedent for limiting the treble damage liability of business entities on a derivative liability basis provided by the recently enacted Insider Trading Sanctions Act.12/ We concur with the recommendation of the ABA Task Force that a provision limiting derivative liability in civil RICO cases should be patterned upon the Model Penal Code/State Law criminal respondeat superior or derivative liability test.13/

Civil RICO is a Serious Problem

The Council supports the amendment of civil RICO because the use of civil RICO against legitimate businesses in conventional business and commercial disputes is a serious problem.

11/ *See*, ABA Report at 361.

12/ Insider Trading Sanctions Act of 1983, H.R. Rep. No. 98355, 1st Sess. (Sept. 15, 1983).

13/ ABA Report, at 361.

RICO destroys the delicate balance in conventional business disputes achieved over decades by the common law and by statute. In this regard, the civil liability provisions of RICO have become a tool for extortion used against the legitimate businesses RICO was originally intended to protect. Civil RICO is not used against organized crime figures, at least not prior to conviction. It is reasonable to assume that it never will be. In fact, the civil provisions of RICO are seldom used in situations involving genuine criminal activity at all.

RICO successfully wreaks havoc on the established precedent of statutory and common law by providing treble damages plus costs of litigation plus attorneys' fees under a statute that is so extraordinarily broad that the Justice Department has been careful to impose strict limitations on its use in criminal cases.14/ The concern of the Executive Branch in utilizing RICO has been that zealous prosecutors will use the extraordinarily broad statute without regard for the intent of Congress and without proper consideration of the impact of a RICO action on a legitimate business or individual.

14/ In 1981 the U.S. Department of Justice issued revised Guidelines for RICO Prosecutions setting stern nationwide policy as to the circumstances under which a RICO criminal prosecution may be sought. Executive Office for U. S. Attorneys, United States Attorneys' Staff Manual, §9-110.200, RICO Guidelines (March 9, 1984).

Of course, there is no such limitation on private counsel seeking to employ the civil liability provisions of RICO. Lured by the prospect of treble damages and attorneys fees, private counsel are imaginative in applying the provisions of civil RICO to conventional business and commercial disputes. Indeed, it has been suggested that an attorney who fails to employ RICO in any situation where it could work to the advantage of his client may violate his professional obligations.[15]

This extraordinarily broad statute has received expansive interpretation by the courts. As the Supreme Court majority in Sedima stated:

> "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to be "liberally construed to effectuate its remedial purposes."[16]

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[15] See, ABA Code of Professional Responsibility, Canon 7: "A lawyer should represent a client zealously within the bounds of the law." ABA Opinion 280(1949): "A lawyer . . . is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness." See also, 'ABA Ethical Considerations 7-3 and 7-4. Disciplinary Rule 7-101(A)(1) prohibits an attorney from intentionally failing" to seek the lawful objectives of his client through reasonably available means permitted by law." Also, Disciplinary Rule 7-102(A)(2).

[16] Sedima v. Imrex Co., ___ U.S. ___, 53 U.S.L.W. 5034, 5039 (July 1, 1984).

The liberal interpretation of RICO derives partly from the "liberal construction" clause and also from the fact that the initial Supreme Court decisions dealing with RICO involved criminal cases.17/

Not only is RICO an extremely broad statute which necessitates careful and clearly defined restraint, but also the predicate acts that support the majority of civil RICO suits are extraordinarily broad. The ABA civil RICO Task Force found that the vast majority of civil RICO cases are based upon allegations of mail fraud, wire fraud, or securities fraud.18/ Many of these cases are based on fact situations that would not support an allegation of ordinary common-law fraud. Many are simple disputes where parties to a business deal did not anticipate the results or where one party tries to ameliorate the results of a bad business decision by filing a lawsuit.

Claims based on mail fraud and wire fraud are easily pleaded in such commercial disputes. The law concerning mail

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17/ E.g., United States v. Turkette, 452 U.S. 576. It is worth noting that in seeking a broad interpretation of RICO from the Supreme Court in the Turkette case, the government specifically assured the Court that the Justice Department would exercise "sound discretion" through a centralized review process in bringing cases under RICO. Brief for Petitioner in No. 80-808, O.T. 1980, p.25, n. 20, cited in Sedima, 53 U.S.L.W. 5034, 5040-41 (July 1, 1985) (Marshall, J., dissenting).

18/ ABA Report, 55-57.

fraud and wire fraud has developed in the criminal context, and the courts have tolerated an extraordinary expansion of mail and wire fraud statutes. As Justice Marshall stated in his dissent in Sedima:19/

> The only restraining influence on the "inexorable expansion of mail and wire fraud statutes," United States v. Siegel, 717 F.2d, at 24 (Winter, J., dissenting in part), has been the prudent use of prosecutorial discretion.

Indeed, the mail and wire fraud statutes have been so broadly interpreted that the federal courts have consistently held that there is no implied federal private damage cause of action accruing to victims of mail or wire fraud violations.20/ RICO, as currently interpreted, permits a civil private cause of action based on nothing more than allegations of mail or wire fraud.

The ABA Report found that approximately 35% of reported cases rely solely or primarily on allegations of securities

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19/ Sedima, 53 U.S.L.W. 5034, 5040 (July 1, 1985) (Marshall, J., dissenting).

20/ See, e.g., Ryan v. Ohio Edison Co. 611 F.2d 1170, 1178 (6th Cir. 1979), (mail fraud); Napper v. Anderson, Henly, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir. 1974), cert. denied, 423 U.S. 837 (1975) (wire fraud).

fraud.[21] Securities fraud as used in RICO has received expansive interpretation.[22] While victims of securities fraud violations have traditionally had both express and implied private civil causes of action for damages under the federal securities laws, these remedies have always been for single damages.

Furthermore, the use of civil RICO "virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws."[23] The development of the law concerning securities fraud has involved the evolution of requirements concerning "standing, culpability, causation, reliance and materiality, as well as definitions of "securities" and "fraud."[24] These limitations may now easily be avoided by alleging mail or wire fraud predicate acts in addition to securities fraud as the basis for a RICO count growing out of a securities transaction.

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[21] ABA Report, 56-57.

[22] ABA Report, 272-276.

[23] Sedima, 53 U.S.L.W. 5034, at 5041 (Marshall, J. dissenting).

[24] Id.

Efforts have been made by opponents of RICO reform to trivialize the significance of the problems created by civil RICO for legitimate business. Citing the number of reported RICO cases, it has been argued that there are really not many instances of the use of civil RICO. It has also been contended that no defendant would settle a civil RICO case of questionable merit and that those businesses which settle threatened RICO suits probably have something to hide and get off easy. Finally, it has been suggested that any problems created by civil RICO may be resolved by removing the term "racketeer" from the statute and by imposing sanctions upon those who initiate frivolous litigation under RICO.

The use of civil RICO against legitimate business in conventional commercial disputes is significant in terms of the number of disputes and the impact on legitimate business. It has been contended that the ABA Report and Justice Department figures25/ indicate that there are only a limited number of reported RICO decisions and RICO cases filed in federal court. Thus, it is argued, RICO really isn't much of a problem.

As any litigator knows, the number of reported decisions, and even the number of cases filed, indicates only the tip of

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25/ DOJ Testimony.

the litigation -- or, more accurately, the dispute -- iceberg. For every complaint that is actually filed, and certainly for every reported decision, there are hundreds of disputes resolved without litigation. Civil RICO affects not only the disputes that are actually brought to court, but also significantly affects the resolution of those disputes that are normally resolved without resort to litigation. Also, the use of civil RICO in litigation, and the use of civil RICO as a threat in commercial disputes, has increased at an enormous rate. With the Sedima decision, it is anticipated that any inhibitions plaintiff's counsel may have had with regard to employing civil RICO will vanish. Indeed, it has been our experience that a number of complaints filed prior to the Sedima decision have been amended since that decision to include RICO counts.

When it was suggested in the July 31 hearings before this Committee that no defendant would settle a RICO suit of questionable merit for anything more than nuisance value, Senator Hatch, referring to his experience as a litigator, quickly dispatched this argument as naive. We concur with Senator Hatch's assessment. Defendants frequently settle cases for considerable amounts though they know the plaintiff's case is of dubious merit. The reasons vary from case to case, but invariably reflect a determination that, despite the questionable merit of the plaintiff's case, the time, disruption, and expense, as well as the risk, outweigh the settlement amount.

The suggestions that the references to "racketeer" and "racketeering" be eliminated and that judges be more rigorous in punishing frivolous RICO litigation, while commendable, would have no significant effect on the serious problems presented by civil RICO as currently interpreted. While one of the complaints often leveled at civil RICO is the ease with which it permits a plaintiff to stigmatize a defendant as a "racketeer," the elimination of the word "racketeer" in the statute, while desirable, treats only a symptom of the real problem without any effect on the problem itself. While we do suggest the elimination of this term, at least in the civil provisions of RICO, we do not believe that its elimination will significantly reduce the stigma that accompanies the filing of a civil RICO suit.

Similarly, the suggestion that the imposition of sanctions on attorneys bringing "frivolous" actions under RICO will stem the tide of inappropriate RICO actions is not helpful. The problem created by civil RICO is not a frivolous litigation problem. Many civil RICO suits have a foundation in a legitimate commercial dispute. Plaintiff's counsel in such a matter has the obligation to represent his client's interest to the fullest extent of the law.26/ If the facts permit him to present the case as a civil RICO suit under existing interpretations of RICO, he would arguably violate his professional obligation if he fails to do so. Courts are always reluctant to characterize litigation as frivolous.

RICO Was Intended to Protect Legitimate Business from Organized Crime

RICO was enacted as Title IX of the Organized Crime Control Act of 1970 27/ The purpose of that Act was "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."28/

The Organized Crime Control Act originated in the Senate. The Senate Report stated that RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate

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26/ Footnote 15, *supra*.

27/ Pub. L. No. 91-452, 84 Stat. 922, 941 (1970).

28/ *Id*.

commerce."29/ This purpose reflected the Senate's concern with organized crime infiltration of legitimate business.30/

The House of Representatives shared the Senate's concern with regard to the infiltration of legitimate business by organized crime.31/ In submitting the draft language that ultimately became the civil liability provisions of RICO, Representative Steiger explained that his proposal was intended to add a private remedy to help in the fight against "organized crime."32/ In discussing the treble-damage remedy during debate on the House floor, Representative Celler, the Chairman of the House Judiciary Committee, explained that this provision was "designed to inhibit the infiltration of legitimate business by organized crime."33/

29/ S. Rep. No 617, 91st Cong., 1st Sess. (1969) at 76.

30/ Id.

31/ 116 Cong. Rec. 6709 (1970).

32/ Organized Crime Control: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary on S. 30 and Related Proposals Relating to the Control of Organized Crime In the United States, 91st Cong., 2d Sess. 520 (1970).

33/ 116 Cong. Rec. 35,196 (1970). Three congressmen dissented from the House Judiciary Committee report. Their objections included a concern that the private civil treble-damage provision would be used to harass innocent businesses. H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970) at 181-196.

The Senate received the bill, as amended by the House on October 12, 1970. Because of the approaching end of the session and impending elections in November, the Senate concurred with the House version of the Senate bill without seeking a conference in order to avoid the possible death of the bill. In describing the House amendments to the Senate, Senator McClellan referred to the civil provision as "comparatively . . . minor changes."34/

Thus, it is quite clear from the legislative history of RICO that Congress' intention in including the treble-damage civil remedy was to protect legitimate business from infiltration by organized crime. Congress did not intend that civil RICO be used against legitimate business in ordinary commercial litigation.

Use of Civil RICO Has Been Contrary To Congressional Intent and The Public Interest

Civil RICO has not been used to bring suits against organized crime as Congress intended. As the Supreme Court stated in Sedima: ". . . in its private civil version, RICO is

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34/ 116 Cong. Rec. 36,293 (1970).

evolving into something quite different from the original conception of its enactors."35/

It has been suggested, nevertheless, that civil RICO be retained, as is, because of its potential as a weapon against fraud.36/ This argument contends that fraud is rampant in the economy and that the government is unable to deal with the problem. The answer is to enlist "private attorneys general" in the fight against fraud by providing treble damages as an incentive. These legal vigilantes will then assist the undermanned government forces in the war against fraud.

While this argument has a certain appeal in theory,37/ the newly enlisted private attorneys general, have turned their heavy armament not on rampant fraud, but, predictably, on the deep pockets of legitimate businesses. The vast majority of civil RICO suits are not efforts by plaintiff's counsel to

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35/ Sedima, 53 U.S.L.W. 5034, 5039 (July 1, 1985).

36/ Statement of National Association of Attorneys General and National District Attorneys Association before the Judiciary Committee, United States Senate (July 30, 1985). This statement, prepared by Professor G. Robert Blakey of the Notre Dame Law School, is consistent with ideas expressed by Professor Blakey in previous writings. E.g., Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237 (1982).

37/ Sedima, 53 U.S.L.W. 5034, 5038 (July 1, 1985).

redress wrongs done to the meek and defenseless by fraud artists or the arrogant and unprincipled of the business community.[38] Most civil RICO suits are efforts by one party to a business or commercial dispute to extort a favorable resolution of the dispute by threatening the other party with treble damages, plus costs of litigation, plus attorney's fees.

Thus, civil RICO is neither being used against organized crime as intended by Congress, nor is it being used to stamp out fraud as advocated by Professor Blakey. According to the Justice Department, only approximately 7% of the private cases filed under civil RICO involve either actual organized crime figures or the kinds of criminal conduct common to organized crime.[39] As Assistant Attorney General Trott concluded in his May 20 testimony before this Committee:

> "Experience has shown . . . that the instances of private civil RICO's use against traditional organized crime activities are far outweighed by examples of its application as a general federal anti-fraud remedy against seemingly reputable businessmen.[40]

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[38] ABA Report, 56-57; see also, DOJ Testimony at 45.

[39] DOJ Testimony at 28.

[40] DOJ Testimony at 45.

CONCLUSION

The current use of private civil RICO in ordinary business disputes is contrary to Congressional intent and is not in the public interest. Congress must respond to the invitation of the courts to limit the use of private civil RICO in such situations.[41] As suggested, this can be accomplished in any of a variety of ways. The life insurance industry is eager to work with this Committee and others to find a solution to the pressing problem of civil RICO reform.

Thank you again for providing the opportunity to present these remarks.

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[41] Sedima, 53 U.S.L.W. at 5039 (1985) See also:

"The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate tool for combating organized crime, "Schact v. Brown, supra. 711 F. 2d 1343, at 1361 (7th Cir. 1983), cert. denied 104 S. Ct. 508 (1983).

"[W]e are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism. . . . It is beyond our authority to restrict the reach of the statute [Civil RICO]." Bennett v. Berg, supra, 685 F. 2d at 1064 (panel opinion).

"Complaints that RICO may effectively federalize common law fraud and erode recent restrictions on claims for securities fraud are better addressed to Congress than to courts." Moss v. Morgan Stanley, 719 F. 2d 5, at 21, quoting Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1121 (1982).

Senator **Hatch**. Mr. Nathan, let us turn to you.

Mr. **Nathan**. Thank you, Mr. Chairman. I am Irvin Nathan, a partner at the law firm of Arnold & Porter, in Washington, DC, and I appear today on behalf of the property and casualty insurance industry.

First, let me say that we very much appreciate your invitation. We also appreciate your efforts to examine this important problem and to work out an appropriate solution to it.

I believe that both I and the property and casualty insurance industry bring a unique perspective to this issue which I would like to share with the committee this morning.

In the late 1970's and early 1980's, I served as a deputy assistant attorney general in the Criminal Division of the Department of Justice where one of my responsibilities was to review proposed criminal prosecutions under the RICO statute. As you have heard this morning, it was about that time that the statute began to be used more frequently and began to be proposed to be used more frequently for criminal prosecution.

We in the Department recognized that this statute, which has laudable aims, is extremely broadly written and could be easily abused. In order to prevent such abuse, we drafted and implemented guidelines to ensure that this broad statute would only be used in the most appropriate cases. I believe the record will show that from that point on, through today, the RICO that statute has generally been used in the criminal context in a prudent way to deal with the problems in which Congress was interested in 1970.

When we look on the private civil side, however, we find a problem because those kinds of internal restraints are not present. Lured by the prospect of treble damages and attorneys' fees, private attorneys have not exhibited any restraint in bringing private civil RICO actions.

The insurance industry, particularly the property and casualty insurance industry, had high hopes for this statute because its members are often the victims of crimes, particularly fraud. In fact, there have been a limited number of occasions, generally involving prior convictions, in which the insurance industry has been a plaintiff in private RICO actions.

But more frequently it has been hit as a defendant in private civil RICO actions which bear no resemblance to the original Congressional purposes of this statute. I have summerized some of the leading cases in my prepared statement, which I understand will be included in the record.

As you know, those cases against insurance companies generally involve disputes over the interpretation of a policy or disputes over the interpretation of a State insurance code. They are clearly not racketeering cases; they are not even fraud cases. They are after contract cases. They are very similar to the kinds of cases which you have described this morning—involving alimony disputes, religious disputes, and landlord-tenant cases.

All of this stems from the fact that the statute is extremely broadly written and thus can be easily abused. I think one thing that is very important for this committee to recognize, Mr. Chairman, is that the cases that you have cited this morning-involving alimony, landlord-tenant and religious disputes—were dismissed before the Supreme Court's decision in July of this year. As a result of that decision, those cases would have to go forward as legitimate RICO cases because the judicially-imposed limitations which led to their dismissals have been eliminated by the Supreme Court. The floodgates are now open as a result of that decision. Today, any case in which a plaintiff can make a colorable claim of fraud can be brought as a private civil RICO action.

I want to call the committee's attention to a recent decision that has come down in the Seventh Circuit Court of Appeals in Chicago. This circuit is the circuit which has given generally a very expansive interpretation to the private civil RICO provisions. This decision came out August 27, 1985. It is called Illinois Department of Revenue against Phillips.

The decision upheld a RICO claim. The RICO claim was a claim for $14,000 in back taxes owed by one individual who was being sued by the State Department of Revenue. The court said that we do not think this is the kind of case that belongs here, but under the plain language of the statute and under the terms of the recent Supreme Court decision in *Sedima*, we feel constrained; we have no choice but to allow this case to go forward. The Court said: "We can only hope that this decision appears to Congress as the distress flag that it is and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us now."

The seventh circuit courts of appeals, several other courts of appeals and the Supreme Court in *Sedima* have urged the Congress to reexamine this issue and to limit the private civil remedy provision of this statute in a way which will reflect its true purposes.

The insurance industry supports amendments to the private civil RICO provisions, which will allow suits for massive, systematic organized crime or fraud, but not allow the statute to be abused in legitimate commercial disputes. The abuse has been the far more common situation. In my experience over the last 15 years since the passage of the statute, I am not aware of a single private civil RICO case that has been brought against an organized crime figure, where there has not been a prior criminal conviction.

The insurance industry believes that there are salutory purposes to be served by this statute, but civil RICO must be limited in some sensible way to prevent the abusive suits that have been brought against legitimate businesses and against a host of legitimate individuals—include former spouses, religious orders and landlords—in a series of mundane matters that Congress never intended and would not want to be brought in Federal court as a racketeering case for treble damages.

The insurance industry will work closely with the committees of the Congress that are examinining this problem and searching for a solution to it. We share the principles that were set forth by Mr. Albenda. We are not looking to reduce the effectiveness of the criminal statute. On the criminal side we think that the statute has generally been used with restraint.

We do think there needs to be a bright line test to establish which cases may properly be brought as civil RICO cases and which may not. We think that several of the solutions that have been offered would deal effectively with the problem, including the requirement of prior criminal convictions. In our view, that proposed amendment would be a direct and effective way to minimize the problem. We also support the proposal made by the New York Bar Association today, requiring prior criminal convictions for any of the three predicate acts which have caused most of this problem, mail fraud, wire fraud, and securities fraud.

We also think that your proposed solution, Mr. Chairman, would constructively address the problem. Such amendments would certainly improve the situation tremendously over that we face today. In addition, we have raised a number of alternative approaches in our statement, any one of which would be a significant improvement over the present law. I would like to elaborate on one of them that I think deserves some consideration.

Having read the testimony and colloquy in prior hearings before this committee, I think this alternative may have broad support from the members of the committee. Incidentally, I share the view that there is no need to use the term "racketeering" in the statute. That term certainly can be eliminated from the act, but that is not at the heart of the problem.

One approach for which we urge consideration—perhaps in combination with other amendments—in that in any private RICO action, there should be a preliminary hearing in which the court would be allowed to examine the allegations of the complaint to make two determinations.

One, is there any factual support for this complaint to go forward? Second, even assuming that all the allegations of the complaint are true and could be proved after trial, is this the kind of civil RICO case that Congress intended to be brought as a Federal treble damage action? In making the second determination, we suggest that a court should look at the guidelines which have been established for the Department of Justice and the principles they use to decide whether to pursue criminal prosecutions. If the case is not properly amendable subject to criminal prosecution—as clearly as these alimony cases, these religious cases and the insurance contract dispute, are not—then the statute will not serve its purpose of allowing private attorneys general to augment their resources of the Department of Justice. If the Department of Justice would never have brought the case in a criminal matter—even if it had known all of the facts and had all of the necessary resources—then it should never be brought as a private civil RICO case.

If we could have some principled way to limit these cases and have them dismissed at the very earliest stages before there is discovery, expense, and publicity, and if the court can make a prompt determination that the case will not be allowed to go forward as a racketeering Federal treble damage action, we believe a lot of the problems caused by the abuse of civil RICO could be solved.

Thank you very much.

[The statement follows:]

STATEMENT OF THE AMERICAN PROPERTY AND CASUALTY INSURANCE INDUSTRY BEFORE THE SENATE COMMITTEE ON THE JUDICIARY DELIVERED BY IRVIN B. NATHAN

September 24, 1985

Mr. Chairman, members of the Subcommittee, my name is Irvin B. Nathan. I am a partner at the Washington, D.C. law firm of Arnold & Porter, and I appear here today on behalf of the nation's three property and casualty insurance trade associations: the Alliance of American Insurers, the American Insurance Association, and the National Association of Independent Insurers, as well as the State Farm Insurance Companies, the major unaffiliated insurer. We appreciate the opportunity to testify before you today on the urgent need for reform of the civil treble-damage remedy provision of the Racketeer Influenced and Corrupt Organizations statute ("RICO"). In light of the recent Supreme Court decision in Sedima, S.P.R.L. v. Imrex Co., inviting Congressional correction of the problem which has led to the abusive misuse of civil RICO, it is imperative that Congress act promptly to refocus the application of civil RICO on its original, laudable goal of combatting organized crime.

My background in RICO is extensive. During the late 1970s and early 1980s, I served as a Deputy Assistant Attorney General for Enforcement in the Criminal Division of the Department of Justice. There I was responsible for reviewing proposed criminal RICO prosecutions, and I assisted in the development of the Department's guidelines for RICO prosecutions. Since returning to private practice, I have litigated and counselled with respect to a number of private civil RICO actions, and I participated in the drafting of an *amicus* brief to the Supreme Court on behalf of the insurance industry in the Sedima case. I have written and lectured on RICO, and I currently serve as the civil law co-editor of the RICO Law Reporter.

Introduction and Summary

In my remarks today, I would like to stress the following points:

(1) RICO was conceived as a statute designed to combat organized crime and prevent its infiltration of legitimate business. RICO's private civil treble-damage action was intended to supplement the limited resources of the Department of Justice in the war against organized crime by providing additional incentives to private parties to seek redress for the direct financial harm they suffered from organized crime's activities.

(2) Private civil RICO has been turned into something very different from its original conception; it has become a powerful and often abused federal treble-damage weapon for plaintiffs in commercial litigation. In the process, it has federalized a great deal of litigation which has heretofore been handled quite adequately in state courts; it has displaced or eroded carefully constructed statutory schemes, such as the federal securities and antitrust laws; and it has seriously shifted the stakes for settlement negotiations through the threat of treble-damage recoveries and the threat to legitimate, reputation-sensitive businesses of being branded in the press as "racketeers."

(3) Fifteen years' experience has shown that the private civil provisions of RICO have rarely been used against organized crime members. Nor have these provisions been invoked primarily in serious cases of business fraud. Rather, the cases brought under civil RICO have typically involved far more mundane commercial -- and even matrimonial, landlord-tenant, and religious -- disputes. In these types of cases, plaintiffs have invoked RICO to take advantage of the

benefits of a federal forum, the prospect of treble damages and the opportunity to label their adversary as a "racketeer." Insurance companies have been victimized by RICO claims in many such "mundane" disputes, involving for example, interpretation of the terms of a policy or a State insurance law. Whatever the virtues of using an "organized crime" statute as a tool against serious business fraud, we think it clear that this federal treble-damage "racketeering" remedy is both inequitable and disruptive when applied to ordinary contractual and other similar disputes.

(4) The federal courts cannot solve the problems which are created by the inappropriate use of civil RICO. The defects in the statute are, to quote the Supreme Court's recent Sedima decision, "inherent in the statute as written, and [their] correction must lie with Congress." The Supreme Court and numerous Courts of Appeals and district courts have sent up what the Seventh Circuit just last month called "distress flags" urging Congress to revise and limit the statute.

(5) To remedy this problem, the property and casualty insurance industry believes that any RICO amendment should be governed by three guiding principles: First, amendment of RICO's private treble-damage action should not interfere with the statute's criminal provisions or the generally effective use of the statute by the Department of Justice against organized crime. Second, only victims of organized, substantial, and persistent criminals should be entitled to recover treble damages for their injuries. Third, any amendment to RICO must draw a bright line between private claims which Congress believes should and should not be brought under the statute, so that inappropriate civil RICO actions can be dismissed at an early stage in the proceedings before a defendant is forced to expend substantial amounts of time and money.

(6) The insurance industry is prepared to support any amendment which achieves these three goals. As a frequent victim of crime, the insurance industry desires to preserve the private RICO remedy but at the same time to make sure that it is used sparingly, only in appropriate cases. A number of alternatives appear to us worthy of serious consideration, any of which, alone or in combination with others, would substantially improve the present situation.

(a) The simplest solution is to require prior criminal convictions for RICO violations or for the underlying predicate offenses. This approach, which appears to have considerable support in the House Judiciary Criminal Justice Subcommittee, has a number of virtues. Principally, it ensures that "racketeering" damages will only be sought from persons who have been proved beyond a reasonable doubt to have repeatedly committed criminal offenses. It would clearly eliminate virtually all abusive uses of private civil RICO.

(b) A second solution, as suggested by Senator Hatch's thoughtful bill (S. 1521), would be to require that a private civil RICO claim must be premised on predicate criminal acts in addition to simple allegations of mail, wire or securities fraud. This approach recognizes that the principal deficiency with civil RICO is the inappropriate ease with which a plaintiff's lawyer can convert many ordinary business disputes into fraud claims.

(c) A middle approach between the first two would be to require prior convictions only where the predicate offenses are mail, wire or securities fraud. A private plaintiff could bring a treble-damage action if he could allege predicate acts other than fraud or if the fraudulent acts had been proved at a criminal trial. Under this approach, the use of the most frequently abused provisions would be curtailed but the statute would still be available for the kinds of offenses traditionally engaged in by organized crime -- including extortion, usury, arson and theft -- as well as for proven fraud.

(d) If the Congress believes that there is a need for a federal treble-damage business fraud remedy that goes beyond organized crime, there are a number of modifications that could be made to ensure that private civil RICO is used only in the most appropriate circumstances. One would be to require that a treble-damage action be brought in a parens patriae suit by federal or state officials. This approach would tend to ensure that before a treble-damage racketeering action is filed, a responsible public official had determined that the case was of the type that Congress intended be brought under RICO.

(e) Finally, the Committee should consider a requirement that in any private civil RICO action the Court hold a preliminary hearing in which the plaintiff would have to establish (1) a reasonable factual basis for its allegations and (2) that the allegations, even if proved at trial, would merit criminal prosecution under Justice Department standards. The latter test would ensure that "private attorney-general" actions under the statute would only be brought in cases where a federal judge finds that the action is of the type which the Justice Department would prosecute if it had known of the facts and if it had adequate resources. A court would be guided by written Department of Justice policies and practices, such as its RICO Guidelines, and any additional standards enacted by the Congress.

In conjunction with any of these approaches, we believe that it would be appropriate to assess sanctions, including a multiple of costs and attorneys' fees, against any party found to have brought a meritless RICO action. However, it is to be emphasized that this remedy, standing alone, will not solve the problem. The essence of the civil RICO problem is that the statute, as presently written, permits the filing of claims that, we are confident, Congress would never desire to see brought in federal court as "racketeering suits." But this does not render such suits "meritless."

In the remainder of my presentation I would like to provide the Committee with examples of inappioprate civil RICO suits which have been brought and, unfortunately, will continue to be brought unless substantial reforms are made -- and made promptly -- in RICO's private civil remedy. I would also like to amplify on the various alternative approaches for reform.

Discussion

Congress enacted RICO as part of the Organized Crime Control Act of 1970. Its purpose was to inhibit organized criminal activity and to protect innocent businesses from victimization by organized crime through infiltration, unfair criminal competition, and massive fraud. One of the businesses Congress intended to protect through RICO was the insurance industry, which has been injured repeatedly through concerted fraud schemes, especially schemes involving arson.

The principal tools chosen by Congress to effectuate RICO's purposes were criminal prosecutions, leading to substantial jail sentences, stiff fines and even criminal forfeiture. In addition, Congress made available to the federal government civil remedies such as injunctions and divestitures. As a last-minute amendment, without any extended explanation, the House of Representatives added an additional sanction -- private treble-damage actions, modeled on Section 4 of the Clayton Act.

Originally, the insurance industry, along with other members of the business community, welcomed the enactment of RICO. It anticipated that the statute would deter organized crime from infiltrating legitimate businesses and reduce the unfair competitive advantage obtained by mob-dominated businesses through their use of techniques of violence and intimidation. Then, as now, the American insurance industry stood strongly in favor of substantial penalties for members of organized crime.

Today, however, the business community has a very different view about the utility and wisdom of the private civil RICO remedy. Although criminal RICO has proven to be one of the Justice Department's most effective weapons in the struggle against organized crime, RICO's private civil treble-damage action has not meaningfully contributed to that effort; rather it has consistently been abused and inappropriately turned against the legitimate businesses the statute was intended to aid.

In the first ten years after RICO's enactment, the private treble-damage action was rarely used. In the last five years, however, use of the statute has grown exponentially. Seventy-five percent of the reported civil RICO decisions were handed down in the last two years, and in recent years thousands of civil RICO lawsuits have been filed in federal courts throughout the country. Yet, in only a handful of these cases has private civil RICO been used to augment public enforcement of the statute against organized, persistent criminal enterprises. In particular, we are not aware of a single private RICO action that has been brought against an organized crime figure who was not already subject to criminal prosecution by government authorities.

At the same time, many hundreds of private RICO actions seeking treble damages have been filed in federal courts against legitimate businesses and individuals based on incidents bearing no relation to the kind of organized criminal activity RICO was intended to prevent.

Private RICO actions have been filed in landlord/tenant disputes, domestic relations disputes, and even intra-church disputes. Most frequently, treble-damage civil RICO claims have been added to ordinary commercial lawsuits. Rarely have these lawsuits concerned serious cases of commercial fraud. Instead, such cases usually involve nothing more than garden variety disputes over the interpretation of statutes or contracts. Out of such mundane disputes, respected businesses -- such as Merrill Lynch, Shearson/American Express, Price Waterhouse, Citibank, and General Motors -- have found themselves charged with "racketeering." The result has been to convert traditional, single-damage state court suits, which heretofore neither raised federal claims nor provided attorneys' fees to plaintiffs, into federal treble-damage actions that are potential goldmines for litigious plaintiffs and their settlement-minded lawyers.

As both the majority and Justice Marshall's dissent in Sedima found, this is not what Congress had in mind when it passed RICO. Nor does it make any sense today as a matter of sound public policy. How did we get from providing ammunition in the war against organized crime to granting extortionate powers to certain groups of commercial plaintiffs in their war on respected businesses? How have ordinary, mundane commercial disputes been turned into "racketeering" charges? It is, unfortunately, very simple. As Justice Marshall concluded, the cause lies principally in the fact that among the criminal acts enumerated within RICO's definition of "racketeering" are mail and wire fraud.

We have no quarrel with the use of these predicate offenses in the criminal context, because organized crime sometimes employs mail fraud or wire fraud to further its purposes. More importantly, in the criminal context, their use is guided by prosecutorial discretion and review. The problem lies with the indiscriminate use of these extremely broad and malleable statutes in the hands of self-interested private parties and their counsel.

To make a claim of mail fraud, one need only allege a scheme to defraud and a single mailing in furtherance of such scheme. Because a RICO claim requires only two such acts, two mailings or even one mailing and one interstate telephone call in furtherance of a single alleged fraud have been construed by some courts to constitute a "pattern of racketeering" within the meaning of the statute.

Ordinarily, mail and wire fraud do not give rise to private civil claims. Only the federal government can bring criminal charges for these offenses, and it reserves these statutes for the most serious matters. However, using civil RICO, any private party can accuse any other person of engaging in mail or wire fraud, without any government charges or convictions. Again quoting Justice Marshall in his Sedima dissent, "[t]he effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering." Thus, in any commercial dispute in which one side can make a colorable fraud claim the basis is laid for a federal treble-damage RICO action.

Civil RICO has also been used to undermine and avoid Congress' carefully constructed, delicately balanced regulatory statutes in a variety of substantive areas. For example, civil RICO has jeopardized the applicability of the private civil remedies under the federal securities laws, which have been developed over decades by the Congress and the courts. Those laws carefully spell out the availability of civil recovery through established standards for standing, culpability, causation, reliance, and materiality. By invoking RICO, a private plaintiff can attempt to avoid all of these limitations, while at the same time obtaining treble-damages and attorneys' fees that are ordinarily unavailable under the securities acts. Other statutory schemes have been similarly disrupted.

It is easy to see why private parties, unfettered by the exercise of governmental standards and discretion, bring such private RICO actions or append RICO claims to existing lawsuits. The most obvious reason is the lure of treble damages and attorneys' fees. By tripling the stakes in the litigation, a plaintiff can often negotiate a more favorable settlement, especially because it is difficult for a defendant to get a RICO claim dismissed prior to trial. The RICO claim also raises the specter that if the defendant loses he may have to pay the plaintiff's attorney's fees, which is contrary to the common law American rule. In addition, adding a RICO claim increases a lawsuit's publicity value. Accusing a defendant of "racketeering" is far more newsworthy than accusing him of breach of contract. In reputation-sensitive businesses such as insurance, banking, and securities, the damage to a legitimate business' reputation by being named as a defendant in a racketeering suit may be more injurious than any eventual financial liability. Simply the threat of litigation under RICO may lead to settlement of unmeritorious cases.

The extortionate effect of a RICO claim can be even further enhanced by bringing the suit as a class action. When all possible claims for an alleged breach of contract or ordinary business tort are aggregated for an entire class and then trebled, the risks of an unfairly coerced settlement are obvious. Thus, Justice Marshall noted in Sedima the substantial irony that "civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."

At the last Senate hearing, a number of Senators asked for concrete examples of abuse of private RICO. We are here today to provide them. The insurance industry has been one of the major victims of this perversion of the purposes of RICO. Insurance companies have been sued as "racketeers" in situations where the companies have been in full conformance with standard industry practices in this heavily regulated business.

For example, in Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983), Lloyd's of London and the Lincoln Insurance Company, consistent with state-mandated claim settlement procedures, denied a claim under a fire insurance policy because they believed that the fire had been set by one of the plaintiffs. Plaintiffs sued, alleging, inter alia, a violation of RICO in that "defendants [through the use of the mails] have engaged in a scheme to defraud by fraudulently refusing to pay claims without valid reasons in order to force persons to compromise their claims for an amount less than they are entitled to under the insurance policies." Id. at 356.

As another example, in Activision, Inc. v. National Union Fire Insurance Company, a suit recently filed in federal district court in California, an insurance company was sued as a racketeer when it refused to make payments under, and sought to rescind, a director's and officer's liability policy on the ground that misstatements had been made in the policy application. Plaintiffs allege as a RICO violation that defendant was engaged in a scheme to issue such policies and collect premiums therefor with no intention of fulfilling its obligations under these policies.

As a final example in the insurance industry, in a series of cases in the federal district court in Georgia, approximately fifteen insurance companies have been sued in private civil RICO actions for "mail fraud." In these cases, plaintiffs, often as purported representatives of a class, contended that under the Georgia no-fault statute, insurers may not subrogate claims for which they have made full payment under automobile collision coverage and that these companies have injured their policyholders by "limiting" them to a single full recovery. The Georgia Supreme Court has substantially rejected the plaintiffs' interpretation of the state no-fault statute. However, this ruling came too late for some insurance companies which had already made multimillion-dollar settlements to avoid protracted litigation and treble-damage, class action exposure. Out of these settlements, over $2,000,000, almost one-third of the total recovery, was awarded to the plaintiffs' attorneys who concocted this "racketeering" claim.

These cases point out how, through RICO, a disagreement regarding the proper interpretation of a complicated state statute or an insurance policy can be escalated into a federal cause of action alleging fraud and racketeering and seeking treble damages and attorneys' fees. I have appended to my written statement a partial list of the insurance companies who have been sued as racketeers in private civil RICO actions.

In none of these cases has a court found that an insurance company had engaged in any impropriety or that it was liable to the plaintiff. Nevertheless, the breadth of the present civil RICO statute, including the mail and wire fraud provisions, and the uncertain state of the law regarding civil RICO, have made it very difficult to obtain dismissals at an early stage in the proceeding. Therefore, faced with the high cost of protracted litigation, fearing the injury to their reputations from being smeared as "racketeers," and recognizing the potential exposure of a treble-damage award, several defendants, including insurance companies, have submitted to extortionate settlement demands.

Outside of the insurance context, hundreds of other civil RICO actions have been brought in circumstances that neither involve organized crime nor contain allegations of serious business misconduct. Let me cite a few examples:

In Erlbaum v. Erlbaum, [1982] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. 1982), a property settlement pursuant to a divorce was turned into a private RICO suit. The divorced wife sued her ex-husband as a "racketeer" because she did not believe he had lived up to his part of the property settlement. The wife's RICO suit was based on mail fraud.

In Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982), a religious disagreement was converted into a civil RICO claim. Plaintiff, a former church member, claimed she had been defrauded by the Scientologists into joining and learning about the church's practices. Similarly, in Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983), a dispute over who should be the next Rebbe of a sect of Chassidic Jews became a RICO suit.

Turning to more traditional business contexts, a large number of RICO suits have been filed in disputes over the proper rate to be charged on bank loans. See, e.g., American National Bank and Trust Co. v. Haroco, Inc., 105 S. Ct. 3291 (1985). In these cases, disagreements over the proper method to calculate a bank's "prime rate" have metamorphosed into treble-damage actions for mail fraud.

Similarly, disgruntled securities customers, dissatisfied with the performance of their investments, have constructed private RICO actions against their broker/dealers. See, e.g., Dakis v. Chapman, [1983] Fed. Sec. L. Rep. (CCH) ¶ 99,498 (N.D. Cal. 1983); Harper v. New Japan Securities International, Inc., 545 F. Supp. 1002 (C.D. Cal. 1982). Civil RICO actions have also become a major tool in combatting corporate takeovers and tender offers. See, e.g., Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983).

The important point to stress about these cases is that few, if any, of them were without some factual basis. Virtually all of them alleged each of the technical elements of a private RICO claim; each of them was based on a claim of fraud. Yet none of these cases concern the type of conduct Congress sought to prohibit through RICO or that Congress could possibly now desire to be the basis for a treble-damage suit in federal court.

Prior to the Supreme Court's recent Sedima decision, the lower federal courts rejected most of these RICO claims by reading certain extra-statutory limitations into civil RICO. The two most often advanced limitations were a requirement of some connection to organized crime and a variety of restrictions on the type of injury compensable under RICO. However, on July 1, the Supreme Court decided the case of Sedima, S.P.R.L. v. Imrex Co., and held that the language of the statute, as presently written, does not permit these interpretations. All nine justices expressed concern about the "divergence" between private civil RICO's current use in ordinary commercial litigation and the "original conception of its enactors" in dealing with organized crime. The Court suggested that the problem of abuse of RICO's private treble-damage action has resulted from Congress' failure to make RICO's statutory language comport with its legislative intent. However, the majority concluded that "this defect . . . is inherent in the statute as written, and its corrections must lie with Congress."

Justice Marshall in his dissent stressed that "[t]he Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions."

Sedima will undoubtedly spur many more civil RICO actions until Congress acts. Plaintiffs who may previously have resisted filing RICO claims out of fear of judicial hostility, will now have no compunction to hold back. In fact, since Sedima was decided, many plaintiffs have sought to amend previously filed complaints in order to add private RICO claims.

The Supreme Court has thus clearly left to Congress the task of dealing with the problem of civil RICO. The lower federal courts have been even more explicit in calling upon Congress to limit the application of the statute. Indeed, after Sedima, the Seventh Circuit Court of Appeals in Chicago, which has in the past given an expansive reading to RICO, went so far as to send what it termed a "distress flag" to Congress to prevent the federal courts from drowning in a sea of private RICO litigation. Illinois Department of Revenue v. Phillips, No. 84-1495 (7th Cir. August 17, 1985). We urge Congress to heed this call and remedy this problem by amending the statute to restore RICO's intended, salutary focus.

The property and casualty insurance industry, as both an intended beneficiary and an unintended victim of the private civil RICO treble-damage action, has reached several conclusions about the nature of desirable Congressional amendments to RICO. We believe that reforms are urgently needed and that any RICO amendment should be governed by at least three guiding principles:

First, amendment of RICO's private civil treble-damage action should not interfere with the statute's criminal provisions or the effective use of the statute by the Department of Justice against organized crime. Indeed, we would even support enhanced criminal penalties under the statute. We also have no concerns about the Federal government's use of the civil provisions of RICO, either for damages or for injunctive relief. Government-initiated RICO actions are brought only after the exercise of discretion by a responsible official and, in the criminal context, after a grand jury has found probable cause to believe that a RICO violation exists. Under the Department of Justice's self-imposed RICO Guidelines, suits are only brought if the case will promote the Congressional purpose underlying RICO. Private actions, by contrast, are motivated by the lure of treble damages and attorneys' fees; nothing restrains an unscrupulous plaintiff from using RICO to slander a defendant's reputation or extort a lucrative settlement.

Second, only victims of organized, substantial, and persistent criminals should be entitled to recover treble damages for their injuries. In enacting RICO, Congress sought to take the profit out of organized crime. Treble-damage relief is an effective way of making gangsters pay for their criminal behavior. Insurance companies, when victimized by organized crime, have attempted to use private civil RICO actions in a few selected cases to vindicate their rights against the perpetrators, and we believe this remedy should remain available for future victims of such criminal activity.

By contrast, those with ordinary commercial disputes have no need for RICO's treble-damage remedy. State common law and statutory remedies are fully effective and provide ample incentive to seek redress in such cases. The proponents of using civil RICO for a broad range of commercial disputes have made no showing that State laws and State courts are inadequate. In our view, there is simply no justification for bringing these cases in the federal courts or for subjecting legitimate businesses to charges of "racketeering" for allegedly breaching a contract or overcharging for a service or product. In addition, in cases of fraud serious enough to merit federal prosecution, the victim will now be entitled to restitution under the provisions of last year's comprehensive crime act. Private civil RICO should be reserved for offenses, such as those committed by organized crime, that Congress has determined merit the extraordinary remedy of treble-damage recovery.

Third, and most important, any amendment to RICO must draw a bright line between private claims which should and should not be brought under the statute. The distinguishing features of a civil RICO claim must be clear enough that inappropriate cases either will not be brought or can easily be dismissed at an early stage in the proceedings. What cannot be tolerated is the current situation, with a statute so broad and ambiguous that the difference between a legitimate RICO claim and an ordinary commercial dispute often cannot be determined until after a defendant has been labeled a "racketeer" and forced to spend tremendous amounts of money and resources in discovery and trial.

The property and casualty insurance industry is prepared to support any amendment which achieves these three goals. As a frequent victim of crime, the insurance industry desires to preserve the private RICO remedy, but at the same time to make sure that it is used sparingly, only in appropriate cases. A number of alternatives appear to us worthy of serious consideration.

The simplest solution is to require prior criminal convictions for RICO violations or for the underlying predicate acts of racketeering. This approach has a number of virtues. Principally, it ensures that "racketeering" damages will only be sought from persons who have been proved beyond a reasonable doubt to have repeatedly committed criminal offenses. Defendants, before being held liable for treble damages, would receive the benefit of the protections traditionally available to criminal defendants: they would only have been charged following the exercise of prosecutional discretion and the consideration by a grand jury; guilt would have been proved beyond a reasonable doubt, and the defendants would have received all constitutional protections. In addition, a prior criminal conviction requirement would eliminate the concern that an indiscriminate civil plaintiff might smear the reputation of an innocent defendant; the defendant's lack of innocence would already have been established in a court of law. Finally, it would be much easier for a RICO victim to recover after a conviction, because the record against the defendant would already have been established.

We recognize that requiring prior criminal convictions would limit the theoretical possibility that a "private attorney general" may initiate a civil action for damages against an organized crime figure, whom the Department of Justice for one reason or another, including a lack of sufficient resources, has not yet prosecuted. However, we urge the Congress to consider that in 15 years of actual experience this "theoretical" benefit has yet to materialize in a single instance. The reasons for this prudent restraint are self-evident. Against this theoretical benefit, the Congress must weigh the many cases of proven abuse which have materialized under civil RICO in the past and which are likely to increase dramatically in the immediate future as a result of the recent Supreme Court decisions.

A second solution would be to require that a private civil RICO claim must be premised on some predicate offense in addition to simple allegations of mail, wire, or securities fraud. This approach recognizes that the principal deficiency with private RICO is the ease with which a plaintiff's lawyer can convert many ordinary business disputes into fraud claims. According to the recent report of the ABA Civil RICO Task Force, in approximately 80% of all private RICO actions, the only predicate acts of racketeering alleged by the plaintiff are mail, wire, or securities fraud. And these same suits account for a far greater percentage of the abusive civil RICO cases. If a private RICO plaintiff can only recover by proving the commission of at least one non-fraud predicate act, civil RICO actions will become much more clearly focused on the kinds of organized criminal behavior the statute was intended to attack. We note, in this regard, that at least two American Bar Association groups have called for limitations on the use of commercial frauds as predicate offenses under RICO.

Such a "fraud plus" requirement is contained in S. 1521, the RICO reform bill recently introduced by Senator Hatch. The insurance industry supports this bill. It would significantly improve the present situation. We recognize, however, that this approach might not provide federal treble-damage relief in situations where there is massive, persistent business fraud.

These first two approaches could also be combined by requiring prior convictions only where the predicate acts charged are mail, wire, or securities fraud. In all other cases, utilizing the more traditional "racketeering" offenses such as extortion, arson or drug dealing, a private civil action could be brought without prior convictions. This approach combines the virtues of the prior conviction and "fraud plus" requirements. Use of the most frequently abused predicate offenses would be curtailed through the imposition of prosecutorial screening, but civil plaintiffs would still be able to serve as "private attorneys general" to recover damages from commonly recognized organized criminal activities.

If the Congress believes that there is a need for a federal treble-damage remedy for business fraud unconnected to organized crime, several alternative amendments to RICO, which would ensure that the private civil remedy is used only in the most appropriate circumstances, deserve consideration. One approach would be to require that treble-damage actions be brought by federal or state officials in _parens patriae_ suits. Such _parens patriae_ actions would permit recovery for persons with meritorious civil claims. Inappropriate RICO claims would be foreclosed by a screening device analogous to prosecutorial discretion. _Parens patriae_ suits ensure that before a treble-damage racketeering action is filed, a responsible public official has determined that the circumstances are of the type Congress enacted RICO to prevent.

Finally, the Committee should consider amending Section 1964(c) to provide for a preliminary hearing in private RICO actions. This hearing would take place early in the proceedings, before pre-trial discovery had been undertaken. At this hearing, a plaintiff would have to satisfy a two-prong test: first, that there was a reasonable factual basis to believe that plaintiff would be able to prove at trial each element of the RICO offense charged; and second, that such a RICO violation, if proved, would be of the type that merited criminal prosecution under Justice Department standards. This second requirement would be met by a judicial determination that the circumstances of the case satisfied the RICO Guidelines promulgated by the Department of Justice for authorizing RICO indictments or that civil RICO recovery was otherwise consistent with written policies and practices of the Department. The amending legislation might also include additional standards, relating to the nature and seriousness of the offense and the amount in controversy.[1] RICO claims failing to satisfy either leg of this test would be dismissed, and in appropriate cases the court might impose sanctions on the plaintiff.

Such a two-pronged preliminary hearing would have several benefits. First, it would eliminate RICO claims based on idle speculation by the plaintiffs, employed solely for the purpose of obtaining a federal forum or forcing a settlement based on the threat of a trebled recovery. Second, it would bar private RICO actions which, though technically satisfying the extremely broad requirements of the statute, did not present the kind of circumstances that merit the enhanced penalties provided by RICO. Most importantly, such a preliminary hearing would ensure that private RICO plaintiffs actually served as "private attorneys general." To fulfill that role, a civil plaintiff must initiate litigation based on conduct that would have been criminally prosecuted if the Justice Department had known of the facts and had possessed sufficient resources. When a plaintiff initiates litigation that would not merit prosecution by any responsible government official, he cannot be said to serve as a private attorney general. Many of the recent private RICO actions clearly fall in this latter category. RICO claims satisfying both standards at a preliminary hearing will, by definition, be appropriate cases for RICO plaintiffs to "prosecute" serious criminal misconduct.

In conjunction with any of these approaches, the American property and casualty insurance industry believes that it would be appropriate to impose sanctions, up to and including a multiple of costs and attorneys' fees, against any party found to have brought a meritless RICO action. However, this remedy standing alone will not solve the problem of abusive misuse of private RICO.

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[1] As an example, we recommend inclusion of an explicit good faith defense in the statute for commercial behavior which fully conforms to state and federal regulations. Such a provision would allow a defendant to obtain an early dismissal of RICO suits premised on conduct which had been approved by government officials.

As you are well aware, judges are exceedingly reluctant to impose sanctions for frivolous lawsuits; increasing the penalties is likely to lead only to still greater judicial reluctance. More importantly, as I have attempted to demonstrate today, the problem with private RICO is not frivolous litigation. Certainly there have been some utterly frivolous RICO suits, but in most private RICO litigation there may well be a legitimate factual dispute. The problem instead is that few of these cases present instances of serious criminal misconduct, the appropriate predicate for the potential imposition of treble-damage liability. These cases simply concern mundane commercial disputes that Congress would never desire to see brought in federal court as "racketeering" claims. Yet under the literal interpretation of RICO, mandated by the Supreme Court, the allegations in most of these cases, if proven, would constitute a facial violation of the statute. Under these circumstances, it would be hopelessly naive to suggest that penalties for frivolous actions alone would prevent the coming avalanche of private RICO claims in ordinary commercial litigation. Congress did not intend RICO to be applied to such cases when it enacted the statute in 1970; nor do we believe that public policy today would support such use of a treble-damage "racketeering" statute.

In my statement today, I have attempted to demonstrate that in its current form, RICO permits private treble-damage actions that bear no relationship to desirable applications of the statute. I have presented a variety of options for Congress to consider to remedy this problem. The property and casualty insurance industry believes that all of these proposals would significantly improve the present situation. We also believe there may be other effective solutions. We are prepared to work with this Committee and others in a flexible, open-minded approach to find a solution to this pressing problem, which meets the objectives we have described. So long as an amendment or series of amendments preserves a remedy for organized crime's victims, permits unhampered criminal prosecution of RICO perpetrators and provides a bright line between appropriate and inappropriate civil RICO actions, the property and casualty insurance industry will support it and work for its prompt passage. We again emphasize the need for prompt passage of legislation because, after the recent Supreme Court decisions, the floodgates will be opened wide for all kinds of civil RICO actions, having absolutely nothing to do with organized crime.

Thank you again for giving us the opportunity to present these remarks.

Appendix

The following is a partial list of insurance companies which have been named as defendants in private civil RICO suits:

- Allstate Insurance Company
- American Motorists Insurance Company
- Atlanta Casualty Insurance Company
- Cotton States Mutual Insurance Company
- Georgia Farm Bureau Mutual
- Lincoln Insurance Company
- National Union Fire Insurance Company
- Nationwide Insurance Company
- Prudential Life Insurance Company of America
- Societe Commerciale de Reassurance
- Southeastern Fidelity Insurance Company
- Standard Guarantee Insurance Company
- State Farm Fire and Casualty Insurance Company
- State Farm Mutual Automobile Insurance Company
- Travelers Insurance Company
- Underwriters at Lloyd's, London
- United Services Automobile Association

Senator HATCH. Thank you, Mr. Nathan.

We will now turn to you, Mr. Parrish.

Mr. PARRISH. Thank you, Senator. I appreciate the opportunity to be here. I do not represent any client here today. I was sort of amused that some of the people who were getting ready to testify said: "Who is Mr. Parrish?" They asked: "Does anybody know Mr. Parrish?" "Who does he represent?" Nobody seemed to know who I was.

Senator HATCH. We know who you are, and we are happy to have you here.

Mr. PARRISH. Literally, this is the first time, I guess, I have ever taken action like this out of what I just consider to be simply compulsion of conscience. I had a feeling that I needed to speak out, and I did. I appreciate that Senator Thurmond gave me an opportunity to come.

My involvement with the RICO statute commenced within days after its passage. At that time, I was an assistant U.S. attorney in Memphis. The then Deputy Attorney General of the United States came to Memphis. We met at the Peabody Hotel, and we tried to figure out what an "enterprise" was and what a "person" was. We started from scratch.

Since that time, which was the fall of 1970, there really has not been a time when I was not involved with the RICO statute. For the first 8 years, it was in the context of criminal prosecutions. I went into private practice in 1977, and, by 1978, I was being consulted by a Fortune 500 corporation, a client, with a particular problem within the corporation, asking for solutions.

I offered a solution involving the civil RICO statute and we filed a lawsuit in California. Since that time I have spent most of my time advising with corporations concerning an offensive usage of the civil RICO provisions in a business context to insure fairness of competition between corporations, and to allow corporations the opportunity to ferret out from within their own ranks dishonesty, which is rampant.

I have worked with the National organization of corporate security directors. I have appeared before various trade organizations for the insurance industry in other cities, et cetera, addressing this subject.

At this point I would limit my remarks to what seems to be the problem that has developed here. That is: Should the civil RICO provisions be used in a business context?

I assume that everybody seems to have some agreement that, outside of the business context or if there are real mobsters involved or if there is extortion involved or bribery or murder or things like that, civil RICO is OK. But, what about fraud, just regular fraudulent business transactions, with which, I would suggest, we are plagued in this country today?

If I were given two options—that is, one to live with the problems that exist or; two, to repeal civil RICO—I would say that we are better off, as a country devoted to free enterprise, with the problems we now have than we would be with a repeal of the statute.

There are problems, and the problems should be addressed in a responsible way. But if they are addressed in a way which is irresponsible—and, to my way of thinking, that would be in such a way that the statute is no longer effective to address business frauds—there would be an irresponsible abuse by Congress.

There is really a larger problem here. It is frivolous lawsuits generally, not just in the civil RICO field. This country is plagued by frivolous lawsuits, and whatever can be done by Congress or any other legislative body, or the courts or whatever, to diminish the horrendous negative effect of frivolous lawsuits in this country is a goal with a laudable objective.

But, I do not think we need to pick out civil RICO as if it is the only cause of the problem of frivolous lawsuits. The bar needs to examine itself; there need to be efforts generally on that front.

Now, I suggest that there are things that should be done to fine tune the civil RICO provisions. I have outlined those—and I would just address a couple of those, I have a minute left here.

One is to retitle the civil RICO provisions. Something along the lines of Federal Business Misconduct Act, and drop use of "racketeer." Require the posting of a bond to cover attorneys' fees for a prevailing defendant in a civil RICO suit predicated on mail or wire fraud up to a maximum of $30,000. Of course, there should be an exception for counterclaims or defensively filed original complaints.

Another solution is to enact treble damage, cost, and attorneys' fees remedies for prevailing civil RICO defendants in a suit predicated on mail or wire fraud who prevail, thereafter, in a malicious prosecution suit against the unsuccessful plaintiff.

Also, I would suggest enacting a 1-year hiatus and toll the statute of limitations for a year on the filing of nondefensive civil RICO suits predicated on mail and wire fraud.

The purpose of the hiatus is to provide a transition period. This is a revolutionizing statute, and basically what it does, by way of revolution in the business community, is that it reestablishes principles of absolute honesty. Situational ethics do not count anymore; relativism does not count anymore.

The unfortunate adage that says "We can only be as honest as our competitors are honest or we will die," cannot prevail in the ethics of the business community. The only way that is going to be eliminated is by something traumatic and revolutionizing like the civil RICO provisions.

However, once Congress, which I wish I would see happen, stamps its approval on the civil RICO provisions as a backup effectively stating that the Surpreme Court rightly interpreted congressional intent, with the fine-tuning directed to eliminate frivolous lawsuits, Congress will make certain that absolute honesty—no excuses acceptable—is the standard for all business transactions now. No matter what the relaxed standard has been, no matter if everybody else in the whole world is operating on a lesser standard, if this absolute; that is, nonrelativistic and nonsituationalist, standard is now the standard, than the business community of this country will adjust, we will see a higher standard of honesty and fairness and above-board business dealings. This will govern reaction between businesses themselves and in competition and between each and its own employees. Business will enforce the enhanced standards against each other to make certain that the competitive edge of lesser standards is not gained.

For Congress, at this time, to turn its back and say, "no, we like it like it is—we have garden variety remedies which maintain the prevailing garden variety standards would be an abandonment by Congress of that which ought to be.

Those garden variety remedies that exist now allow for toleration of a level of institutionalized dishonesty on the part of basically honest people who do not conceive of themselves as doing anything dishonest and who have been taught to do what they do by respectable people in their institutions.

Now, these respectable people are confronted with allegations that they are dishonest, and it is a traumatic thing. But, what is honest and what is not honest cannot be determined by who it is that has said or done that which is questioned. I suggest it is a good trauma and that Congress should not back off from the challenge that exists now. The challenge is whether Congress has the courage, in spite of immense pressure from the most respectable quarters, to reaffirm civil RICO.

[The statement follows:]

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October 17, 1985

The Honorable Orrin G. Hatch
United States Senate
Room 135, Russell Senate Office Building
Washington, D.C. 20510

Re: Response To Questions Posited, But Not Answered, In The Judiciary Committee Hearing Held September 24, 1985 Regarding Civil RICO Reform

Dear Senator Hatch:

I, again, extend to Senator Thurmond and you sincere thanks for the opportunity afforded me to appear and testify in the Oversight Hearing conducted by the Judiciary Committee on September 24, 1985. Further, I am grateful for the expeditious, courteous and thoughtful way you conducted the Hearing. The respect which I had for you before was enhanced by your obvious sincerity and the concern with which you are addressing the issue of civil RICO reform.

There is no room for doubt that the disposition evidenced by S.1521 and your comments at the Hearing is thoughtfully formulated. My apparent disagreement with your position on this issue is expressed with the utmost respect for you. Too, there appears to be common identification of the problem and a common desire that the problem should be solved. My disagreement is not with the motive but the means which unintendedly eradicates the solution to the greater problem which the civil RICO provisions address.

Because the detractors of civil RICO are screaming bloody murder, before any meaningful discussion can proceed, one must stop and look closely at what is causing the uproar. Reduced to its base, the claim of American big business interests is that it does not want to be bound by, yea cannot even survive under, the standards required by the mail fraud statute if those standards are made enforceable in such a way that departure from them could be disastrous to an offender.

When you look at the mail fraud standards, it is sad to think that anybody, much less American industry, would feel threatened by that standard. It is succinctly stated by the Court of Appeals for the Fifth Circuit in *United States v. Kreiner*, 609 F.2d 126 at 128:

> The scheme is measured by a non-technical standard; the measure of the fraud is its departure from moral uprightness, fundamental honesty, fair play and candid dealings in the general life of members of society.

Years ago, in 1932, the great jurist, Learned Hand, stated it as follows in *United States v. Rowe*, 56 F.2d 747 at 749:

> True, the law still recognized [that] *in bargaining* parties will puff ... in terms which neither side means seriously ...; [b]ut *it is no longer law* that declarations of value can never be a fraud. Like other words, they get their color from their

> setting, and mean one thing when exchanged between traders, and another when uttered by a broker to his customer. Values are facts as much as anything else; they forecast the present opinions of possible buyers and sellers, and concern existing, though inaccessible facts ... [a]nd while *it may once have been true* that one might safely use them to stuff any gull one brought to hand, liability has expanded as *the law has become more tender towards credulity*. The *defendants* at bar *inveigled* their victims into a *position of confidence* by *pretending* that *they* would collect their claims, and offering them a settlement which they recommended as *advisors*.
>
> ***
>
> It may be impossible to measure his loss by the gross scales available to a court, but he has *suffered a wrong*; he has *lost his chance to bargain with the facts before him*.
>
> This is the evil against which the [mail fraud] statute is directed. (emphasis added)

Finally, the United States Supreme Court elaborated on the standard as follows in *Durland* v. *United States*, 161 U.S. 306 at 312-314:

> In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a *scheme* glittering and *attractive in form, yet unreal and deceptive in fact*, and known to him to be such. (emphasis added)
>
> ***
>
> [b]ut the *contention* on his part is *that* the *statute reaches only such cases as, at common law, would* come within the definition of 'false pretenses' in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future. ... [a]nd then, as counsel say in their brief, it [the indictment] discloses on its face absolutely nothing but an intention to commit a violation of a contract. (emphasis added)
>
> ***
>
> A question thus presented is one of vital importance.... [W]e cannot agree with counsel. *The statute is broader* than is claimed. ... (emphasis added)
>
> ***
>
> But beyond the letter of the statute is the evil sought to be remedied .... [I]t is common knowledge that nothing is more alluring than the expectation of receiving large returns of small investments. Eagerness to take the chances of large gains lies at the foundation at all lottery schemes and, even when the matter of chance

> is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all. (emphasis added)
>
> ***
>
> In light of this, the statute must be read and, so read, it includes everything designed to defraud by misrepresentation as to the past or present, or suggestions and promises as to the future. ... [i]t would strip if of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a promise. This, which is the principal contention of counsel, must be overruled. (emphasis added)

Hearing the testimony in opposition to continued viability of civil RICO, I am reminded of the biblical injunction which prohibits one with a beam in his eye from criticizing the mote in the eye of another. Unquestionably, there is a mote represented by the present problems related to the use of civil RICO provisions in some contexts by some plaintiffs' attorneys. However, without intending any aspersion, I would suggest that some of the defendants or their trade associations complaining about the mote are doing so with a beam in their eye. What I am concerned is happening is that all of the focus is being directed toward the mote, and those expressing such concern will walk away from the inquiry having preserved intact the beam, the protection of which was the real motivation for drawing attention to the mote. If this happens, a genuine travesty will have occurred.

Of the remarks which were made at the Hearing on September 24, the one which caused me most concern was your repeated observation that nothing being suggested by you as the means to address the conceded problem areas with civil RICO would in any way inhibit criminal prosecutions of those who violate the law in a white collar context. While this is literally true, practically speaking, it is a statement with ominous overtones because of its lack of moment.

Surely there could be no dispute with the proposition that RICO, including its civil provisions, had, and continues to have, as a primary purpose to create enhanced, expanded and additional remedies to problems existing at the point of its passage. I would suggest that the problems needing to be addressed with enhanced and additional remedies in 1970 have become even greater now than then. Prime among these problems is white collar crime. Having been an Assistant United States Attorney who, for eight years, spent the vast majority of my time in prosecution of white collar crime, I can tell you that an infinitesimally small percentage of the incidences of white collar crime are even investigated, much less prosecuted. At this point, they are hardly even thought of as crime. The reason for the percentage being so low is not, as the civil RICO detractors so often like to claim, because "responsible prosecutors" would not indict for those allegations of criminal conduct being pled by civil complaints under RICO.

The plain and simple fact of the matter is that there is not enough manpower in the prosecutorial ranks to even begin to address effectively the white collar crime problem. The vast majority of out and out white collar crime is simply prioritized out of the investigation and prosecution potential category because there are not enough investigators in the IRS, Postal Inspection Service or the FBI but, if there were, there are not enough prosecutors in the Department of Justice but, if there were, there are not enough judges on the bench, but, if there were, there are not enough correctional institutions and on and on to deal with the result of non- selective prosecution and non-prioritization.

As a prosecutor, I had to succumb to prioritizing. But, I did not do it until after much suffering. That is, I, at first, resolved that I would never make a decision to prosecute or not to prosecute based on the amounts or people involved in the offense relative to the manpower in our office. I proceeded on the basis than an offense was an offense and who the offender was or how large and complicated or inconsequential and uncomplicated the offense, (i.e. how prestigious, how powerful, how big, hom small, how religious or irreligious, how moral or immoral, how upstanding, outstanding, understanding or outcast, how wealthy or poor, or whether the criminal conduct was motivated by purity or evil) relative to other offenses, would never influence whether or not I proceeded with full scale prosecution. Though I attempted to remain unbiased, if anything inflamed me, it was the plea that "everybody" is doing the same thing.

After a few years of this approach, I concluded that the powers that be, whoever they are, apparently had not intended it to be that way except in the eighth grade civics book. The sheer physical limitations on human capacity and resources with which to respond became crippling. The system, given the normal normal capacities of normal human beings, simply could not take that kind of textbook approach. As a consequence, large, actually enormous, quantities and certain categories of white collar crime are excused from prosecution. When that situation persists, as it has for several years, those in the excused categories simply adopt, as standard operating procedures, ways of doing business which, though enhancing profitability, are, when viewed from the absolutist perspective of the law, are patently illegal.

Simply stated, civil RICO has put in gear a private attorneys general approach to supplement the impossibilities of our public prosecutorial system to respond to the massive white collar crime problem which has infected our economy to frightening degrees. It is much like placing highway patrolmen fifty feet apart throughout the interstate highway system to enforce the speed limit. This is the system saying, it is impossible for us to jail all of the white collar offenders, but we will do the next best thing. That is, set up a private sector civil remedy which, like the usury laws, will make the cost of non- compliance with the absolutist standards of the mail and wire fraud statutes so great that one who dares to cross over the line risks continued existence as a viable economic entity. This is a big problem, but not effectively dealing with the white collar crime problem is even bigger.

This is like unleashing thousands of new prosecutors and millions of new investigators with access to proof even more accessible than what is available to the FBI. Suddenly, the mail and wire fraud violations which, through necessities of the official prosecutorial limitations, have for many years existed in the excused category have been thrust into the prosecutable category. It is not an overstatement when I say that this will literally revolutionize the standard operating procedures in many industries. Those standard operating procedures have been deemed situationally acceptable because prosecutions never occur unless the degree of the violation reaches the egregious level which, though unwritten, everybody seems to know about where the line separating the egregious and the excusable is. It is much like having a speed limit of 55 mph, but everybody knows that tickets are not given unless you go over 65 mph. Nobody ever complains that you were going 60 mph unless, of course, you have an accident, in which case, your negligence becomes per se, in hindsight, at exactly the point you commenced going 55.1 mph.

The effect of the civil RICO provisions is that there has flashed on the scene a new rule. It says that the unwritten rule that industry in the United States could tool along at 65 mph with only the slightest fear of repercussion has been repealed and, at the same time, the penalty for going over 55 mph has been increased to life imprisonment. This enters in a context where virtually the entire business community is humming at 65 mph and adjusting to meet the new standard is traumatic and threatening. Nevertheless, no matter how threatening, this is a trauma which must be endured and a result which must be accomplished or honesty will become a passe relic of history as well our economic system.

With respect to the effect of civil RICO suits on criminal prosecutions, I predict an inevitable result. Criminal prosecutions of white collar crime offenders will increase significantly and the deterrence and standard-setting which will result from those criminal prosecutions will be salutary. Once there has been a successful civil suit under RICO, sufficient proof, tested before a jury, will have been assembled and have evoked a positive jury response to an allegation which requires a finding that the defendants have committed mail fraud offenses. United States Attorneys, being made aware of the existence of such proof, having access to depositions and trial testimony will follow through with indicated criminal prosecutions without the necessity of manpower allocations which would be required even if the information surfaced by the civil suit were initially presented to the prosecutor for full development in the criminal context. Further, as an experienced prosecutor, I can assure you that the guilty plea rate will be very high.

A second result of civil RICO suits is inevitable, in my opinion. Companies which bite the bullet and voluntarily adjust their standards to the absolute requirements of the mail fraud statute will not sit idly by and allow their competitors an edge by use of standards less than those mandated by the mail fraud statute. Thus, if necessary, companies will, within their industries, force each other to abide by the new standards. Finally, recognition that civil RICO is here to stay, without substantive modification, will require companies to clean out from within their own ranks those employees in decision-making positions who are apt to operate on less than the absolutest and highest standards of the mail fraud statute.

This brings me to a second comment repeatedly made by you at the Hearing on September 24. By your comments, you seem to give undue credence to the fact that there are existing civil remedies other than RICO by which the results which can be accomplished through RICO can be obtained. I do not doubt the sincerity of your belief. But, respectfully, I suggest that it simply is not true. The status quo, with its present level of tolerated dishonesty, will be insured by existing civil remedies. The mail fraud standards are significantly higher than common law fraud standards.

Also, costing, pricing and overhead, over a long period of time, have adjusted to absorb the risk of loss represented by common law fraud suits. The frequency of such suits has been substantially mitigated by various barriers which the law has created, and the potential gain as a remedy has made suit less attractive than enduring the wrong in many instances. The present standard operating procedures, with their tolerance for a level of dishonesty, has adjusted to take into account the civil remedies other than RICO. Thus, the need for enhanced and new remedies which every member of the Senate and House which passed RICO in 1979 had to concede was a major purpose of RICO.

This brings me to the third comment, which I considered to be of significance, made in the Hearing on September 24. This was a recommendation from the property in casualty insurance trade association communicated through a witness. This suggestion was made that there be a clarification of the definition of "pattern" which would exclude uses of the mails or interstate wire communications if those uses were in the "normal course of business." Query: What if the normal course of business of a "legitimate" business enterprise includes conduct which falls short of the standards of the mail fraud statute? I suggest to you, quite sincerely, that there is much more kind of use of the mails, than we want to believe. Hopefully, this suggested amendment is so self-serving and protectionist that it will be deemed frivolous. Considering its source, this is a curious suggestion is a curious suggestion when I remember how many mail fraud cases I prosecuted where insurance companies were victims, and the only mailings were those of the insurance companies which, in the normal course of business, mailed or received from the mail claim forms, warrants and payment of claims or made routine inquires through long distance phone calls.

It is essential that, in assaying the mote, one not reason that whether conduct is short of that required by the mail fraud statute by looking at those who are engaging in the conduct. The mail fraud standards are the same for the most respectable and reputable and most despicable and reprobate. It seems, for some reason, that if those engaging in the conduct are upstanding, reputable, honorable, educated, wealthy leaders in the business and civic community, then the conduct, per se, could not be fraudulent, whether of the mail or the common law variety. This is particularly deemed to be the case if "everybody else" is doing the same thing.

When I criminally prosecuted persons in this category for violation of the mail fraud statute, I invariably heard exactly the same argumentation both in court and out of court. However, the jury always convicted.

The truth is that, many times, the liable persons are precisely of the type described. They are no less such persons because of their offense. The sad fact is that such people have, more or less, been trapped in a system over which they consider themselves to have no control and which has dictated that they do exactly what they did, just as was "everybody else" around them, in order to exist. Such persons, many times, have never even stopped to consider that what they are doing is "wrong." In fact, the thought that it is, or might be, unlawful conduct has never entered their minds, and, truly, if they thought it was "wrong," they would never have engaged in the conduct or would cease engaging in it. But, this does not excuse either them or their conduct. It is not the law that needs changing, it is the deviating conduct.

Only something as dramatic and traumatic as civil RICO will reform the system which has captured people into what I have call institutionalized dishonesty. If Congress walks away from civil RICO, by amending it essentially out of existence, it will be walking away from these trapped people. Nothing short of civil RICO can do the job.

Opposition on the part of a substantial number of district court judges is expectable. In the first place, the bench is essentially made up of men and women who are apart of this system which has come to tolerate a measure of dishonesty. While, in theory, these judges condemn dishonesty, when the penalty for it is so severe, they begin to chaff at the thought that the tolerance level of "non-serious" dishonesty is genuinely being tightened down very tight.

As judges, they begin to think in protectionist terms realizing on whom it is going to fall to enforce this new non-tolerance and, being the pessimist that most judges are, they cannot conceive of a society where the deviation level from the heightened standard will not be great in spite of the penalty. All of this, in a pessimistic judge's mind, adds up to a substantial increase in workload piled on top of a workload which is already oppressive. Further, there is some philisophical difference on the part of some judges which generates opposition, sometimes emotionally expressed, to an attempt to require such a high level of honesty. Judges also are susceptible to the notion that conduct is within the acceptable range if "everybody" who is respectable seems to be doing "it."

Trial judges and trial lawyers are the ones who first and most intensely have to deal with the mote. This causes judges to lose perspective. They are drawn to concentrate on the mote and overlook the beam.

Finally, trial judges are those on whose shoulders fall the weight of suddenly having thousands of new mail fraud prosecutors and millions of new mail fraud investigators on the scene. Moving literally millions of mail fraud violations from the excused category to the prosecutable category, in the short run, definitely means more work for many district judges. The short run, for many judges, is the only run which makes any difference. The fact that, within a few years, civil RICO is apt to have had the effect of substantially lessening their case load is little solace.

Since Justice Oliver Wendell Holmes declared for the Supreme Court that equitable considerations were irrelevant very severe penalty for even a relatively slight violations of federal usury laws, usury cases have become almost extinct in the federal forum. Once national banks institutionalized the thought that the cost of usury is more than a bank can survive, usury virtually disappeared. No doubt, so long as the chance of gain from usury had the possibility of being greater than the risk of loss, usury remained in the realm of options when considered from a business decision perspective. However, once it was clear that the risk of loss far, far exceeded the chance of gain, it became a non-option. In like manner, when the absolutist standards of the mail fraud statute became institutionalized in American free enterprise, because deviation therefrom could threaten survival of a business, institutionalized dishonesty will become as extinct as usury on the part of national banks.

I agree that RICO is inappropriate for use in a domestic relations case or a religious dispute. The reason I agree is that these are not matters affecting commerce in the sense of presenting a threat to our economic system. This is a mote which can be easily eliminated by legislative amendment. Other measures, which I have suggested, can address legitimate frivolous lawsuit questions.

However, it must be made abundantly clear what a "frivolous lawsuit" is. I say this because invariably any lawsuit brought under civil RICO which questions a standard operating procedure in the normal course of a legitimate business is uniformly declared by civil RICO antagonists as a frivolous suit. This is especially so if the questioned practice is one generally accepted in the industry. It is somewhat disconcerting that many of the civil RICO antagonists are district judges who buy into this perverted view of what a frivolous lawsuit is. If it is true, as one of the witnesses on September 24 suggested, that some judges are contemplating Rule 11 sanctions for frivolous civil RICO cases, my best guess is that the judges likely to first use such judicial power are those who would consider as a frivolous suit any which questions a standard operating procedure of a legitimate company used in the normal course of business. Leaving to district judges the discretion which your bill grants is a very dangerous precedent.

This letter, like my other two, is much longer than it should be. Like Mark Twain did, I must apologize for the long letter but offer as my excuse lack of time to write a short one. But, it was insightful to me to hear your comments and gain a fuller appreciation of what seemed to be troubling you with RICO in its present form. I have tried to concentrate my expressions in this letter on those questions and hope I have contributed to further thought on your part with respect to those precise points.

Though only a very few people in society understand the magnitude of the question presented by civil RICO, a common theme seemed to be expressed in the Hearings on September 24. That is, the revolutionary significance represented by civil RICO. In this, I concur. However, the revolution signified by civil RICO, in my opinion, is totally good and long overdue.

The consumer groups and Moral Majority activists have not yet entered, in any significant way, the debate over civil RICO reform. I would hope that Congress will swiftly act to reconfirm and affirm that civil RICO is available for full force use to eradicate the beam after minor modifications by Congress to eliminate the mote. If this happens, it will not be necessary to activate these two groups and experience the further polarization which will come from intensifying the issue under those circumstances.

Very truly yours,

Larry E. Parrish by RJA
Larry E. Parrish

LEP/hr

cc: The Honorable Joseph R. Biden, Jr.
The Honorable Robert C. Byrd
The Honorable Dennis De Concini
The Honorable Jeremiah Denton
The Honorable John P. East
The Honorable Charles E. Grassley
The Honorable Orrin G. Hatch
The Honorable Howell Heflin
The Honorable Edward M. Kennedy
The Honorable Paul Laxalt
The Honorable Patrick J. Leaky
The Honorable A. M. McConnell
The Honorable Charles M. Mathias, Jr.
The Honorable Howard M. Metzenbaum
The Honorable Paul Simon
The Honorable Alan K. Simpson
The Honorable Arlen Specter
The Honorable Strom Thurmond, Chariman
Mr. William Miller
The Honorable James Sasser
The Honorable Albert Gore, Jr.

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August 16, 1985

The Honorable Strom Thurmond
United States Senate

The Honorable Orrin G. Hatch
United States Senate

The Honorable Howell Heflin
United States Senate

The Honorable Jeremiah Denton
United States Senate

The Honorable Paul Laxalt
United States Senate

The Honorable Charles E. Grassley
United States Senate

Dear Senators:

By letter dated July 16, 1985, addressed to Senator Thurmond, I expressed to you thoughts which I have about the civil provisions of the RICO statute. Since then, there have been two days of hearings conducted by the Judiciary Committee, and I have received reply from one of you only. Though appreciated, the reply I received was hardly more than a kind acknowledgement of receipt.

Frankly, I am heartsick at what I fear I see happening especially in light of a post-Hearings conversation with one of the Judiciary Committee staffers. I am directing this letter to you because I have such an affinity with you philosophically.

I am a conservative Republican. I have been outspoken on many issues. I consider each of you to be champions of virtually every cause to which I am committed. I am about as much a laissez faire capitalist as one could be in modern society. To the degree that I err on the subject, I always err in favor of free enterprise and governmental non-involvement in economic and social matters. In addition, I am a moral absolutist. I have no use for Humanist thinking on any subject, especially situational ethics.

I have provided professional expertise in efforts to eliminate obscenity. I have devoted an immense amount of professional effort in helping to solve the obscenity and drug problems in our country. I have a pronounced pro-life stand against abortion and other forms of homicide. I am active in the Christian school movement. I have a position compatible with yours on the freedom of students in public schools to pray. I have made contributions in the areas of law enforcement reform and penology (from a conservative perspective) in order to curb the crime wave. Finally, I am very active in organizing Christian businessmen to make an impact in the business community by taking outspoken and demonstrative steps to be the salt God meant them to be.

When I see men like you, who I so whole-heartedly support, taking a situationalist and, essentially, uninformed position relative to the civil RICO provisions, I am genuinely saddened. Because I know that the appearance of such a position is a misstatement of what you have so openly made known as your stance for integrity, I am left with nothing to conclude except that you have been misinformed by persons seeking to take unfair advantage of you.

I feared that the length of the letter which I wrote combined with the intricacies involved in the subject matter would mitigate against it even being read by you much less given serious consideration. But, you have had to listen to someone to formulate your position. Though I did not hear the testimony given at the Hearings, according to my information, the Hearings had little more purpose than to adduce evidence to confirm preconceived inclinations. I doubt very seriously if the persons who have been able to persuade you have covered any topic which I did not address in my July 16, 1985 letter.

Everybody wants a ten minute answer to a hundred billion dollar question. Too many times ten minutes is just about how much thought is given to very serious questions. I genuinely beg of you to read with care and formulate a careful and studied, as opposed to emotional and pre-conceived, response to each of the points in the letter which I wrote on July 16, 1985. Before that letter was sent, I had it edited by three astute writers with strict instructions to cut out every superfluous word and thought. To have written less would have required me to pass over salient "yeah buts" and "what abouts."

In the same way that no matter how restrictive one's view is of government, it has to be admitted that self-preservation of our society is the least government must insure. There are at least two essential prerequisites of self-preservation efforts which government must take with respect to the economy. The first and foremost is that, in order to participate in the economy in the United States, one must do it in an honest and fair way or suffer severe consequences. Caveat emptor and all that it implies is a precept from the decadence of Rome, not from its glory, and should not be an example for a civilized economic system like ours. That is, the government cannot, under any circumstances, at any time, tolerate dishonesty and allow it to persist unabated in our economy. It makes no difference what variety of dishonesty or what justification is posited for it, it simply cannot be allowed to exist, and the perpetrators of it, be they leading citizens or Mafioso goons, cannot be allowed to engage in it. The strictest standards of absolute honesty must be boundaries fenced with high voltage electrical fences within which our economic system must operate.

Sadly, those fences have now been trampled on and worn by such constant contact that our economic system itself is in disrepair. All the civil RICO provisions do is reconstruct the fence with new and more effective fencing materials and the voltage has been turned way up. To the disgrace of this country, when the juice was turned on, the most unsuspecting folks were found straddling the fence, and they are now yelping to high heaven. Rather than getting off the fence and back within the boundaries, these persons are screaming for the courts and Congress to turn the switch off. What the upstanding business and professional people who have been found climbing on the fence are trying to convince the courts and Congress is that the civil RICO provisions were created only to be applied to those who are operating outside the boundaries, but definitely not those who are just simply playing on and straddling the fence. Please do not succumb to this baseless plea for Congress to endorse and condone dishonesty surfaced by the civil RICO provisions. Thankfully, the Supreme Court did not.

I wish I could remember how many times since I have been practicing law I have had to advise business clients that their practices or those which have become standard in their industry are violations of criminal law only to have them react in disbelief. I have had them say that they knew it might be subject to question, if raised, but they responded with genuine shock when I proved to them that the very practice about which they had inquired was a federal felony. The most common response is that it "just could not be" against the law because literally every person they knew in the business they were in was doing exactly what I was telling them was a felony. They would say that, if I was right, there were alot of nice people who ought to be in jail. I have made a practice of forcing clients in this situation to sit in my presence and personally read the case authorities so they would know that I was not exaggerating or stretching in the least to make a point. After being convinced, a common experience is to have that client look at me with a sense of dispair and a question asking what they should do now. When I would suggest that the answer to that seemed obvious to me, I would often find that it did not seem quite as obvious to them. Sometimes they would try to shrug the matter off with the observation that they guessed it did not make any difference since nobody seemed to be doing anything about it. This is simply: "It can't be wrong because everybody is doing it." Believe me, the answer is not to change the law and make the dishonesty okay now.

You owe it to yourself and the constituency out here who look, like me, to you for moral leadership in government to read carefully and compare the court decisions. Do not just limit your reading to the recent Supreme Court cases which are helpful but not nearly as definitive as some of the decisions in the Courts of Appeal. The split decision of the three judge panel in Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482 (2nd Cir. 1984) is profitable reading because Judge Oakes, writing for himself and one other judge, states an opinion which can be compared on the same facts with the dissenting opinion of Judge Cardamone. If one reads those two opinions in the same case and limits himself to assessing which is the most logical, cogent and well reasoned opinion, and which is laced with hyperbole, emotionalism, logic stretched to the incredulous and unfounded presuppositions, there could be absolutely no doubt which of the two opinions has the force of good sense behind it.

The same is true of the unanimous decision of the Seventh Circuit in Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984). Also, I would commend the unanimous opinion authored by Judge Harlington Wood of the Seventh Circuit in Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983). It is also notable that Judge Wood, at the time Congress passed RICO with its civil provisions, was the Deputy Attorney General of the United States intimately and personally familiar with the congressional purpose. You might further find it of interest to remember that Justice Rehnquist was also in the Department of Justice when RICO, with its civil provisions, was passed through the congressional efforts of no lesser lights than Senator Hruska and Senator McClellan.

I guess the impetus for this letter was a conversation I had yesterday with a much experienced former official of the United States government. He is a person who has no respect for persons he denominates as "pontificators." These are persons, in his view, who "wear their morals on their sleeve" so others may take note of how "good" they are. The problem he finds with such persons is that, from his experience, most of them are first order hypocrites. Our conversation got around to the fact that those of you to whom this letter is written have supposedly taken positions in opposition to the civil RICO provisions.

Your positions served for him as additional evidence to prove his "pontification theory." That is, in his view, you seem very ready to condemn and legislate against the sins of others so long as the "others" are people other than, according to his assessment, your white-collared friends. However, as he would see it, when it gets down to requiring those with whom you sit in the pews at church to be absolutely honest in their business dealings, as he said, you seem to be much less concerned about morality.

This hurts me deeply to see such accusations leveled at you. I defend you and stand with you day in and day out, but, by your opposition to the civil RICO provisions, you make it hard to defend against my friend's observation even if it is unfounded.

Yours very truly,

PARRISH & MULROONEY, P.C.

Larry E. Parrish

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July 16, 1985

The Honorable Strom Thurmond, Chairman
Senate Judiciary Committee
Russell Building
Room 218
Washington, DC 20515

Dear Senator Thurmond:

This letter is in reference to the upcoming congressional debate over Pub. L. 91-452, Title IX, 84 Stat. 941 codified in Title 18, United States Code §1964(c) which was enacted in 1970, commonly known as the civil (private-party) provision of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Congress, as the record makes clear, did not lightly consider the implication and practical effect of the Act when first debated and passed; to the contrary, every aspect of the Act was seriously studied and thoroughly analyzed. The legislative history consumes approximately 2200 pages, and, after its passage, legal commentators and the courts took up the debate and supplemented the public record by adding probably ten times that many pages in the form of commentary and court opinions.

The vast majority of those pages have been devoted to the criminal provisions of RICO, but, of late, a vociferous debate has raged, in a judicial context, concerning the civil provisions of RICO. This debate reached an historic milestone on July 1, 1985 when the Supreme Court of the United States rendered its opinions in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, _____ U.S. _____ (July 1, 1985); Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384 (1984), aff'd per curiam, ____ U.S. ____ (July 1, 1985). In these decisions, the Supreme Court confirmed the public policy announced by Congress in the civil provisions of RICO and validated its use according to the broad language employed by Congress in its enactment.

Now, the debate seems to have once again turned sharply to Congress. According to reports in The Wall Street Journal, the Senate Judiciary Committee will open hearings on what, if anything, Congress should do to restrict the use of the civil RICO provisions as the basis for civil lawsuits between private litigants or between non-federal government entities and private parties or other governments.

Before the debate reconvenes, I am compelled to do whatever possible to assure that these extremely important issues are handled with a clear understanding of the likely effects of their resolution in light of my own experience. In an article which I authored over three years ago, I wrote as follows in Insurance Counsel Journal (July 1982) p. 367:

> The end result could be a massive infusion of wholesome honesty and fair play throughout the American free enterprise system. That this must be induced under the gun only confirms human nature and does not diminish the fact that every citizen would thereby benefit.

In my opinion, there is widespread misunderstanding of the issues presented by this debate -- issues, the correct resolution of which is crucial to the preservation of our economic system across-the-board. These issues address genuinely fundamental precepts of the philosophical underpinnings of our system of economics, not just its fluctuations from day-to-day or generation-to-generation, and, because of that, our very form of government. I feel that, because of my direct personal experience with RICO from its birth, resulting from having worked extensively with its application, I am uniquely positioned to understand what is at stake and see beyond the deceptive surface of argumentation which is influencing decisions of some Congressmen causing them to reach conclusions which are diametrically opposed to their own espoused moral and political views.

Years of extensive personal involvement and practical experience with RICO have left with me a unique facility with the statute itself as well as its application, so that I believe that I am well qualified to speak concerning this subject. The following will give you some idea of my background in this area. As an Assistant United States Attorney from 1969 through 1977, I commenced a day-by-day in-court experience with the criminal provisions of RICO. Shortly after I went into private practice, I filed what I believe to be the first private party civil case of any significance under RICO in which I represented a Fortune 500, multi-national corporation against an alleged disloyal executive employee. Since that time, I have consulted with other large corporations with similar objectives and now represent two large corporations in litigation using the civil RICO provisions.

As indicated above, I have published on the subject and have another article in progress. I can safely say I have followed every development of law concerning RICO, civil and criminal, and, until the most recent surge, probably had one of the most complete libraries on civil RICO, including unpublished court opinions, legal commentary materials and notes from conversations with many attorneys in the country then involved in civil RICO litigation. Being careful not to overstate, I doubt that there is anything about RICO or any controversy or debate that has taken place about it with which I am not familiar.

What I most fear, as Congress takes up this issue, is that reactions to superficially appealing arguments, fanned by an immense lobbying from respectable quarters of corporate America, will overshadow what, by comparison, will appear to be little more than squeaks from the other side. Unfortunately, neither the funding nor the organization exists to properly and adequately advocate the importance of not rendering nugatory the civil RICO provision. The death knell can be accomplished by either patently striking §1964(c) from the books or, perhaps more effectively, by subtly puncturing the effectiveness which has now developed through hotly contested court cases, including a final resolution by the United States Supreme Court. Though the effectiveness of my feeble squeak might go unnoticed, conscience dictates that I try to contribute what I can by this letter.

In the context of the controversy surrounding the passage of RICO in the original Senate debates, Senator Hruska, a sponsor and driving force, with Senator McClellan, in the passage of RICO, maintained the view, with others, that the civil provisions of RICO were of primary importance and the criminal provisions were only an "adjunct" to the civil. See 115 Cong. Rec. 6993 (1969) and 116 Cong. Rec. 602 (1970). Among those joining Senator Hruska in this view were the Deputy Attorney General of the United States(see Organized Crime Control: Hearings on S.30 Before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong. 2d Session (1970) at 408), the

Department of Justice (see id. at 171), and the Association of the Bar of New York City. (see id. at 327) Some have suggested, however, that nobody in Congress anticipated that the civil RICO provisions would be used as frequently against the category of defendants which has emerged as those most often sued. Nevertheless, the Congressional Record reveals that Senator Hruska may have foreseen its use as it has developed and the importance of such use to the repair and preservation of our economic system.

As to why the civil provisions of RICO are so expansive, the Supreme Court and the dissenting Justices concur in the observation that it is the inclusion of mail fraud (Title 18, United States Code §1341) and wire fraud (Title 18, United States Code §1343) as predicate offenses. No member of the Supreme Court and, to my knowledge, no judge on any other court, has questioned Congress' power to legislate as expansively as the Supreme Court found it did. Reduced to its essense, the only objection of the dissenting Justices is that such a far-reaching statute that impacts so profoundly on society ought to be accompanied by a more explicit statement of legislative intent. The real question is whether civil RICO ought to be law.

It is my studied opinion that the expansiveness of civil RICO, provided by inclusion of mail fraud and wire fraud as predicate offenses, is as important as any action taken by Congress on a domestic business topic in the past twenty-five years. The salutary effects of this enactment have hardly begun to be felt.

Until the Supreme Court ruled on July 1, 1985, the statute had been fought so hard in court that few of those who will be most impacted by the civil RICO provisions had significantly altered their conduct, the vast majority, instead, hoping that the Supreme Court would relieve them of the obligation. Now that the door has been slammed by the Supreme Court, these same interests will flood Congress in a last gasp effort to avoid the essential change in their business practices made essential by the civil RICO provision. If Congress follows the lead of the Seventh Circuit and the Supreme Court in reaffirming the mandate of the civil RICO provisions, dramatic and healthy benefits from change will soon begin to flash on the scene of society, and every citizen in the United States will benefit enormously.

In sum and substance, the only thing the civil RICO provisions signal is that standards of absolute honesty and above board fairness in business dealings which affect interstate commerce are now mandated. Whether this is re-establishment of former standards or establishment of a new and higher standard is debatable; however, that the mandated standards are absolutely good and can have nothing but absolutely good effects is indisputable.

Before the civil RICO provision, the risk inherent in less than fair dealings and less than absolute honesty in business had been reduced to a point that the rewards to be gained by such conduct made the risk worth taking. Over time, a nonplanned, inherent actuarial-type process had worked itself out so that a certain level of unfairness and a certain level of dishonesty had become accepted as a standard of conduct in the business world with a calculable low risk of loss. Put in the colloquial phraseology of an old sage: "When so many people have been doing it for so long, it don't seem like sin no more."

What the civil RICO provisions have done is upset the unwritten actuarial table and increased the risk of loss, caused by deviating from the standard of absolute honesty and absolute fairness, to a level where the risk is no longer worth taking. In other words, the civil provisions of RICO represent a resounding statement by the government of the United States that anything less than absolute honesty and absolute fairness in business dealings in the United States is intolerable and will exact from the deviator a heavy toll.

Five years ago, the best data that could be compiled estimated billions of dollars a year in losses to the economy of the United States just from employee dishonesty alone. No doubt the losses have grown since that time. Much of this dishonesty is at the executive level. Furthermore, it appears to me that much of the employee dishonesty is induced by the observation of the employees that the companies themselves, in their dealings with other companies, suppliers and customers are engaging in practices which are less than fair and honest. In other words, "everybody is doing it," so it must be okay or, even worse, necessary.

When businessmen are criminally prosecuted under the mail fraud statute, for illicit business practices, the unerring plea is that they were simply doing what "everybody" else was doing. All of the Watergate convictions ended with the convicted defendants, most even to this day, decrying that "everybody" else was doing the same thing, so, why me? Or, occasionally, some would say that they were caught in, or simply a victim of, a system. What is frightening is that there is a ring of accuracy in what is said. Consequently, it is the system itself that must be corrected. The civil RICO provisions make the needed correction in the business world.

Probably the most effective use which has been made of the criminal RICO provisions has been to convict government officials of "commonplace" dishonesty in the exercise of their public office. Included among those convicted have been the Chief Judge for the United States Court of Appeals for the Seventh Circuit, the Governor of Maryland, the Governor of Tennessee, several mayors, police officials, sheriffs and many others. Government, and, consequently, society as a whole, is much the better because of the use of RICO as a tool and an impetus to clean up government and maintain the higher standard set by the cleanup process. Through the civil RICO provisions, consumers, employees and competitors in the private sector are initiating a similar cleanup process in corporate America. Though it may seem shocking, and though some fine-tuning might be done to improve the cleanup process, speaking from a societal standpoint, only positive results will be realized because of RICO's civil provisions.

Before the enactment of RICO, I spent eighteen months with the Federal Trade Commission as a trial attorney. Because I was assigned to the Bureau of Deceptive Practices, I studied myriad deceptive trade practices which literally consumed the economic life of this country. As I engaged in investigations involving these deceptive trade practices, I was amazed at their intricacy, complexity, subtlety and effectiveness. As I talked to entrepreneurs engaged in the various practices, I heard one recurrent theme -- "I would give anything if you could stop the practices, but, until they are stopped across-the-board, a decision for me to stop unilaterally would be suicidal." I became convinced of the sincerity of some of these business men and women who, for the most part, seemed to be basically honest persons with a desire to do right. Many were pillars of their community and exemplary as business people and models of character to young people. However, they were, more or less, openly involved in dishonest and deceptive practices for the purpose of reaping more profit than would be possible if they eliminated these practices.

As a young FTC lawyer trying to respond to what I was discovering, I was dumbfounded by the government's ineffectiveness in the situation It was obvious to me, in whatever product area I examined, that the standards were being eroded by the largest corporations. Once the standard, after erosion, was set, it was effectively dictated to the remainder of the industry. I began to cope with the fact that these large corporate interests seemed to control government, legitimately nonetheless, so that governmental reaction to the unfair and deceptive business practices was neutralized. The tail seemed to be very effectively wagging the dog.

Quite simply, what happened with civil RICO is that it went unnoticed through Congress and became law before the business interests whose lack of standards would be affected knew what had happened. Furthermore, it remained law for ten years without those business interests knowing or understanding what had happened. During the intervening ten years, between passage and the time when the business interests began to understand what had happened, the courts, including the United States Supreme Court, hammered out the details concerning RICO in the context of case precedent.

Thus, the civil RICO remedy seemed to flash on the scene with ready-made case precedent which set standards of absolute honesty and absolute fairness in business dealings much stricter than the business community had been accustomed to meeting. Rather than modify their behavior to conform it to the stricter absolutist standards now effectively mandated by the civil RICO provisions, these business interests have undertaken massive efforts to repeal the absolutist standard in favor of the operative standard which permits dishonesty, deceptive practices and general unfairness so long as it could be justified by "everybody is doing it" or, at least, "everybody" who is "anybody" economically is doing "it."

As long as enforcement of standards, be they good or bad, is left to government, these big business interests feel generally protected as they operate within guidelines, unwritten, but time tested, of the actuarial table showing a low risk of loss. The general ineffectiveness of government is not planned by government but is caused by understaffing in addition to the political influence business can legitimately wield to restrain the power of government in dealing with such practices.

However, once the effective enforcement of the enacted standard is shifted to the private sector, the business interests most affected have lost the unofficial, but effective, control which they would continue to have were enforcement left only to government. If standards of absolute honesty and absolute fairness are to be enforced by private civil action, the business community in this country has no choice but to make changes of immense positive implication to the economy. We are a government which is and, in my opinion, should be partial to solutions of private sector problems by the private sector. If such problems are handed to the private sector for solution, the solution will be more sure. The civil RICO provision does just that. These changes will sharpen and enhance competition, drive prices down, quality up, and revolutionize what have sadly become eroded, but accepted, standards. In short, it is much easier to take advantage of another person if you can lie (tacitly or affirmatively) to that person than it is to gain a legitimate profit given up willfully by the person after having dealt with him in an absolutely honest and fair way.

The knee-jerk reaction of antagonism by certain segments of the business community is selfish and evidences a shortrange view. It is, and should be viewed as, a perfect opportunity for the business community to regurgitate from its ranks corruption which has crippled it. Long-range, the business interests now opposed to broad application of the civil RICO provisions are the members of society most to benefit most from the higher standards which will become absolutely essential if the present edict of the United States Supreme Court remains an unaltered rule of law.

In addition to bolstering the standards of honesty and fairness in the legitimate business community, re-establishment or establishment, whichever one chooses, of higher standards of integrity in the business community by application of the civil provisions of RICO is essential to accomplish what everybody concedes was a primary purpose of the enactment of RICO; that is, the eradication of Mafia-type syndicated crime from the Nation's economic system. At present, "legitimate" business, too often of the Fortune 500 type, forms a solid phalanx by "accepted," but deteriorated, business practices making it next to impossible to penetrate through and ferret out, by civil remedy, the syndicated crime element.

Once Organized Crime (note the capital letters) elements launder their money into "legitimate" business, there already exists an atmosphere which permits them to operate at an "acceptable" level of dishonesty and multiply their lucre. However, when one looks at the business landscape, the syndicated crime elements blend in so unnoticably with the reputable business elements that they are almost impossible to spot.

One would expect, as soon as Congress reaffirms as its intent that which the Seventh Circuit and the United States Supreme Court declared to be its intent, that those among the business community who are genuinely legitimate will immediately upgrade their business practices and establish absolute honesty and absolute fairness as the governing standard across-the-board. They will enforce that standard on each other by resort to the civil RICO provisions, if necessary. Illegitimate business interests, i.e., the syndicated crime elements, will then be exposed for a direct hit or will have dissolved because the cover under which they operated will have been removed. However, attempting to get to the second level, which is of primary importance, but allowing the "legitimate" business interests to continue to operate according to the eroded "everybody is doing it" standard now prevailing is impossible.

The deletion of mail and wire fraud as a predicate offense under RICO would deal the death blow to the legitimate purposes of RICO, especially civil RICO. Furthermore, for Congress to do this would be morally inconsistent.

Mail fraud is a serious offense of national import which has been painstakingly forged in the crucible of the federal courts over the past one hundred years. The mail fraud precedents are carefully thought out, and they have been reviewed and re-reviewed in the courts innumerable times. Again and again, the government of the United States has reaffirmed that one guilty of mail fraud may be punished by imprisonment of up to five years, and that each mailing or receipt from the mail is a separate offense for which consecutive sentences can be imposed. An insurance fraud, involving use of the mails (as all do), could quite conceivably earn for the violator a twenty-five year prison sentence.

Yet, those who are now clamoring for Congress to eliminate mail fraud as a predicate offense, in at least a civil RICO case, are effectively saying that the very same conduct should be permitted without a civil remedy to the victim. Instead, that victim is supposed to be relegated to common law relief under the laws of fifty separate states, each of which, in some particular, varies from the other. Those garden variety remedies have, over many years, proven ineffective in coping with what has now become a problem of immense proportions.

The risk of loss from possible criminal prosecution for mail fraud has done little to prevent the illegitimate business practices engaged in by legitimate businesses. Those practices have served to undermine the moral fiber of our economic system. If businesses, faced with the decision of whether or not to engage in mail fraud, are not required to take into account the probability of severe civil penalities, then it is only logical that such practices will continue at the same level as is present now. But, that is an optimistic prediction. What will really happen is that the rate of increase in immorality in business will continue at an increased pace, and "the gain-is-greater-than-the-risk" zone will become larger and larger. The present level of tolerated dishonesty in our economy is a national disgrace.

Much is often said about the breadth of mail fraud. Granted, it is a broad statute with a heavy penalty; but, an examination of what is prohibited by mail fraud, however, would leave no one questioning whether that which is punishable is grossly immoral and dishonest if measured by an absolute standard, rather than the "everybody is doing it" cliche'. One who claims that his conduct, or more specifically the conduct of his business, should not be judged by mail fraud standards is arguing for the right to be something less than aboveboard, candid, moral, honest and fair in his business dealings. All the mail fraud standard requires is above board, candid, moral, honest and fair business dealings. Such a person is not satisfied with the less than admirable adage that "all is fair in love and war." He would prefer to expand the list to include love, war and "competition."

Though Congress would be quite justified in leaving the civil RICO question exactly where it has been resolved by the Supreme Court, there are two areas of concern which Congress may wish to address. One is that persons who are simply "doing what everybody else is doing" feel unfairly treated by the law when they allegedly are stigmatized as racketeers and mobsters. This concern may be easily calmed by the use of more appropriate statutory terminology.

Words could be chosen which would be effective in striking a blow at genuine racketeers and mobsters without categorizing them, and there could be no claim of stigma by others found to be engaging in the prohibited activity. As a matter of practice, I have always avoided using the word "racketeer," or its counterpart, "racketeering," or "organized crime" in complaints which I have filed. I do this for the specific purpose of avoiding the chance of stigmatization. I would strongly suggest, therefore, that Congress alter the statutory language, so that what is now labeled as "racketeering" be substituted with the simple designation of "predicate acts" and that references to "organized crime" be deleted.

Second, because there is a measure of irresponsibility among a segment of the bar, Congress might need to take action to eliminate, or to reduce to a minimum, the chance of frivolous lawsuits. What I wrote in 1982 was printed as follows in the Insurance Counsel Journal (July 1982) at 355:

> Fact situations to which RICO is literally applicable are myriad. There would hardly be any end to an attempt to exhaust all of the different possibilities for its use. Every fraud is different from the one before and after it. The real question is not whether RICO can be used but whether wisdom and prudence would make using RICO inappropriate.

With respect to the frivolous suits problem, I would suggest, first, that Congress, require, after some future date, the posting of a bond of $10,000 to accompany the filing of a civil RICO suit which relies on the predicate offense of mail or wire fraud, for the purpose of defraying the defendant's attorney's fee if the plaintiff does not prevail in the suit. The amount of this bond could be increased, perhaps to a statutory maximum, as the litigation progresses, on motion to the court and by proof that the bond is inadequate. Thus, a civil defendant who prevails in the litigation would not be faced with filing and proving a malicious prosecution claim in order to be relieved of the burden of attorney's fees.

Second, to further alleviate frivolous suits, Congress ought to give serious consideration to the amendment proposed during the original debates of civil RICO provisions providing for treble damages if a successful civil RICO defendant subsequently prevailed in a malicious prosecution suit against the civil RICO plaintiff.

A third solution to the frivolous suits problem is a bit more innovative. A one year hiatus in the filing of new private party civil complaints predicated on mail or wire fraud would accomplish several objectives. First, it would provide an opportunity and incentive for the business community to concentrate on adjusting its standards, i.e., get behind the line drawn by the civil RICO instead of fighting to move the line to the place where the low level standards are now. Second, it would give the courts the opportunity to work out the fine points of the law, as announced by the Supreme Court, by adjudicating the pending cases without being bombarded with a flood of new cases. Third, during this period of transition and fine tuning of the law, an opportunity for pre-suit settlement of claims which might otherwise have been filed will be provided in a context which should induce both sides to more knowledgeably and rationally approach the subject.

Of course, an exception would have to be made for counterclaim and affirmative defense use, during the hiatus, of civil RICO predicated on mail fraud or wire fraud. Otherwise, businesses seeking to take advantage of business practices not sanctioned by the civil RICO standards will rush to court to enforce that advantage while the victimized defendant is helpless to defend. If what is being defended is a state court suit in a state where the state law will not permit state courts to adjudicate civil RICO claims, the exception must allow the sued party to file a defensive claim as an original complaint in federal court.

After the one year hiatus, the transitional upheaval would have settled, and legitimate businesses could operate within the statute to the benefit of all. The statute can then be effectively aimed at the unquestionably illegitimate businesses with full concurrence of all.

There is something very puzzling to me, as I consider the issues raised and discussed in this letter, concerning the debate over civil RICO. Ironically, it seems to me, the conservatives and defenders of morality generally have become among the most vociferous opponents of civil RICO. I believe that the explanation for this must be that these same persons are outspoken advocates of the free enterprise system, and they have been misled into thinking that the civil RICO provisions somehow present a threat to free enterprise. They fail to recognize, however, that the civil RICO provisions provide free enterprise with the ability, in the context of private litigation, to correct within itself a wrong which is, like a rotting cancer, insidiously destroying the free enterprise system. Nothing could be more pro-free enterprise and, at the same time, of benefit to society across-the-board (which seems always to the case), than the civil RICO provisions. It is a paradox among paradoxes to find some of the most vocal supporters of the free enterprise system, with whom I side, most opposed to one of the things which Congress has done in the past twenty-five years to most advance the free enterprise system. The intentions are admirable; but I am afraid that the consequences of their actions to modify or do away with civil RICO would defeat the very purpose sought to be accomplished by their opposition.

It is true that, for the short-term, civil RICO is causing a transition within the free enterprise system which results in considerable groaning and twisting. Such is always the case when bad-tasting medicine or painful medical treatments need to be administered to a sick patient. The remedy is not to withdraw the treatment and, thereby, allow the patient to perish in pain to which he has become calloused and, in the process infect others. Rather, the remedy is for the patient to endure the bad medicine in hopes of saving his life.

In conclusion, Congress would be carrying out its responsibility to look after the public's interest if it took no further action with respect to the civil RICO provisions except to review and declare that the Supreme Court had provided all of the resolution necessary. This would affirm that the intent found by the Supreme Court was the intent of Congress.

But, if some other action by Congress were deemed appropriate, I would suggest the following:

1. Amend the preamble to leave it without doubt that Congress deliberately included mail fraud and wire fraud as predicate offenses and intended the broad application in private-party civil uses which the Seventh Circuit, the dissents of Judge Cardamone, in the Second Circuit, and the Supreme Court found was indicated by the statutory language;

2. Re-title the civil provisions so that they are thereafter known as the Federal Business Misconduct Act and drop use of the words "organized crime," "racketeer" and "racketeering;"

3. Require posting of a bond to cover attorney fees for a prevailing defendant in a civil RICO suit predicated on mail or wire fraud, up to a maximum of $30,000.00, excepting counterclaims and defensively filed original complaints;

4. Enact a treble damage, costs and attorney's fee remedy for a prevailing civil RICO defendant, in a civil RICO suit predicated on mail or wire fraud, who prevails thereafter in a malicious prosecution suit against the unsuccessful plaintiff;

5. Enact a one year hiatus, thereby tolling the statutes of limitation, on the filing of non-defensive civil RICO suits predicated on mail or wire fraud.

Very truly yours,

By: ______________________
Larry E. Parrish

LEP/bt

P.S. See attached list for identity of officials receiving a copy or an original of this letter.

The Honorable Howard L. Berman
The Honorable Frederick C. Boucher
The Honorable Jack Brooks
The Honorable Hank Brown
The Honorable Howard Coble
The Honorable John Conyers, Jr.
The Honorable George W. Crockett, Jr.
The Honorable William E. Dannemeyer
The Honorable Michael DeWine
The Honorable Donald Edwards
The Honorable Edward F. Feighan
The Honorable Hamilton Fisk, Jr.
The Honorable Barney Frank
The Honorable George W. Gekas
The Honorable Dan Glickman
The Honorable William J. Hughes
The Honorable Henry J. Hyde
The Honorable Robert W. Kastenmeier
The Honorable Thomas N. Kindness
The Honorable Dan Lungren
The Honorable Bill McCollum
The Honorable Romano L. Mazzoli
The Honorable Carlos J. Moorhead
The Honorable Bruce A. Morrison
The Honorable Peter W. Rodino, Jr.
The Honorable Patricia Schroeder
The Honorable Charles E. Schumer
The Honorable John F. Seiberling
The Honorable F. James Sensenbrenner, Jr.
The Honorable E. Clay Shaw, Jr.
The Honorable Lawrence J. Smith
The Honorable Harley O. Staggers, Jr.
The Honorable Patrick L. Swindoll
The Honorable Mike Synar
The Honorable Joseph R. Biden, Jr.
The Honorable Robert C. Byrd
The Honorable Dennis De Concini
The Honorable Jeremiah Denton
The Honorable John P. East
The Honorable Charles E. Grassley
The Honorable Orrin G. Hatch
The Honorable Howell Heflin
The Honorable Edward M. Kennedy
The Honorable Paul Laxalt
The Honorable Patrick J. Leaky
The Honorable A.M. McConnell
The Honorable Charles M. Mathias, Jr.
The Honorable Howard M. Metzenbaum
The Honorable Paul Simon
The Honorable Alan K. Simpson
The Honorable Arlen Specter
The Honorable Strom Thurmond
Garner J. Cline, Esquire
The Honorable Harold Ford
Mark H. Gitenstein, Esquire
The Honorable Albert Gore, Jr.
The Honorable Ed Jones
The Honorable Donald Regan
The Honorable Edwin Meese
The Honorable James Sasser
Dennis W. Shedd, Esquire
The Honorable Don Sundquist

Senator **Hatch**. Thank you. I appreciated the comments made. I might say, Mr. Parrish, your statement is a thoughtful plea for adequate enforcement against white-collar criminals who might abuse the free enterprise system with fraudulent schemes and unfair practices.

I personally agree with you that such conduct is a disgrace and those who commit such acts are criminals who can and ought to be prosecuted under the laws of the States, whether they wear a white collar or not, and I might add under Federal criminal law as well.

Unfortunately, none of the legislative proposals that I have seen would prevent criminal actions from being brought against people who commit these types of immoral wrongs. Moreover, these very same people can be held liable civilly in common law suits. Moreover these suits will frequently include punitive damages.

In other words, white-collar criminals are not likely to escape. But in the meantime, legitimate businessmen and women are being labeled as "racketeers" and hauled through an extensive Federal court process in order to meet the charge that they, too, are mobsters.

That is clearly what these hearings are designed to try and resolve and I am concerned about that. Let me just ask you people who represent the insurance industry something. I was fascinated by a recent Georgia case involving the insurance industry.

Evidently, when Georgia enacted its no-fault insurance law, there was some question as to whether it included a right of subrogation. So, accordingly, several litigants sued insurers on the theory that the insurers had committed fraud by subrogating claims for which they had made full payment because presumably their policyholders would be limited to a single full recovery.

As you know, the Georgia Supreme Court later upheld the insurance companies' interpretation that the Georgia law did include a full right of subrogation. Unfortunately, though, several companies had already made multimillion-dollar lawsuits in order to avoid protracted litigation. Apparently they wanted to avoid the racketeering label. This case adequately illustrates the problem.

Now, maybe we can get so callous to it that it will not make any difference in the future because we will have so many lawsuits in this area. But, it is offensive to call people racketeers when they clearly are not racketeers. I think that case also illustrates that problem.

Mr. **Nathan**. Mr. Chairman, we share your view the Georgia case illustrates very clearly. The case raises a number of important issues about the potential abuse of civil RICO. In the first place, as you point out, ultimately the insurance companies' interpretation of the statute was vindicated. However, even before that issue was resolved, the matter in dispute was simply a question of statutory interpretation. It was not an issue that could fairly be characterized as "racketeering," leading to these claims of treble damages.

Moreover, Mr. Chairman, the insurance industry, of course, is sensitive to its reputation, and then several companies were forced to settle and pay large amounts of money in these class actions because of the potential harm to their reputations and the exposure to treble damages to each class member.

In addition, it is important to note that the attorneys for the plaintiffs in those cases received over $2 million in attorneys' fees, representing more than a third of the amounts which are likely be paid to the insureds. The insureds, incidentally, had already been compensated 100 percent for their losses, but were seeking three times an amount above their full coverage.

Senator HATCH. Sure.

Mr. NATHAN. It is a very inappropriate use. In addition, permit me, if I may, respond to something Mr. Parrish said to underscore that this is not an issue of frivolous lawsuits. The problem here is in the breadth of the language which Congress enacted.

The Supreme Court has said the deficiency in here is in the language of the statute. That can be seen from the cases that we have cited, including that Georgia case, and the domestic relations case. For example, the wife in that case may actually have not been receiving the alimony payments to which she is entitled. She may have been defrauded; she may not be getting the full amount of checks to which she is entitled. It is not necessarily a frivolous case. It may be perfectly meritorious. It may well be that she should be allowed to bring her former spouse to court to get this resolved.

The problem is that if you look at the language of the RICO statute and the mail fraud and wire fraud predicated, the domestic relations case comes within the confines. But, if it comes to court, it ought to be in domestic relations court, in a state court, in a city court, for resolution. It is not something that belongs in Federal court as a racketeering case.

So the problem is not the lawyers who are bringing frivolous actions without any basis in fact. The problem is that the language of the statute as it exists is too broad, and now that the Supreme Court has said that this broad language must be read literally and must be interpreted liberally, the courts are not easily going to be able to get rid of these inappropriate cases.

That is why you have these distress flags coming up from the circuit courts saying, please help us; stop us from being inundated in a flood of cases that are likely to come forward; please put some limits on this statute; limit it to a way that you think a private remedy ought to be afforded for racketeering and for treble damages in a Federal court.

Senator HATCH. We understand that.

Let us turn to Senator Specter.

Senator SPECTER. Well, thank you, Mr. Chairman. I would just like to commend the chair for convening these important hearings and express my regret at not being able to be here longer, but we are in the midst right now of an appropriations markup.

What I would like to do is submit certain questions for the record, and I am sorry that I cannot stay, but we are in the midst of the agriculture appropriations markup right now.

Senator HATCH. Thank you, Senator.

Senator SPECTER. Thank you.

Senator HATCH. I want to thank everybody for appearing today. I think these hearings will be very helpful to us. Hopefully, we can come up with some appropriate solutions. Thank you so much.

With that, we will recess until further notice.

[Whereupon, at 11:35 a.m., the committee was adjourned.]

[The following was received for the record:]

APPENDIX

MACHINERY AND ALLIED PRODUCTS INSTITUTE

Statement of the
Machinery and Allied Products Institute
to the
Judiciary Committee
of the
United States Senate
concerning

CIVIL RICO SUITS

October 9, 1985

The Machinery and Allied Products Institute (MAPI), the national spokesman for capital goods and allied product industries, appreciates the opportunity to offer a statement of its views on "Civil RICO Suits" brought under 18 U.S.C. 1964(c) for inclusion in the record of the committee's current hearings on the subject. Because of member company interest, the Institute has followed with growing concern the course of events which has led to this hearing.

Our statement consists of a brief introductory passage which sketches the background to the subject and considers some especially pertinent features of civil RICO's legislative history, summarizes the MAPI position, and then elaborates upon the several elements of that summary.

Background

Adopted as part of Title IX of the Organized Crime Control Act of 1970, the civil remedy provisions of the Racketeer Influenced and Corrupt Organizations Act created few waves in the first years of their existence. However, in testimony before a House subcommittee on September 18, 1985, a Justice Department representative said, "The number of published opinions rendered annually in private civil RICO actions has been increasing steadily--from 1 in 1978, to 2 in 1979, to 6 in 1980, to 18 in 1981, to 40 in 1982, to 68 in 1983, to 97 in 1984."/1 This growth in civil RICO litigation evidently reflects a growing awareness of the possibility of recovering damages under 18 U.S.C. 1964(c).

The civil RICO right to sue for treble damages plus attorney's fees was added as a kind of afterthought--and near the end of the legislative process--to an Act which had as its stated objective:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime./2

1/ Statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, September 18, 1985, p. 23.

2/ The Organized Crime Control Act of 1970, P.L. 91-452, U.S. Code Congressional and Administrative News, 91st Congress, Second Session (1970), volume 1, p. 1073.

The private right of action is conferred by Section 1964(c) of the Act which says, "(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." [Emphasis added.] Thus one must examine Section 1962 in order to understand fully what is wrought by Section 1964.

Section 1962 of the Act, labeled "Prohibited Activities," says, in part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . . [Emphasis added.]

This proviso raises two definitional problems: What is a "racketeering activity"? and what is a "pattern of racketeering activity"? Section 1961 of the Act supplies a part of the answer to the first of these questions. "Racketeering activity" is defined as any one of four classes of enumerated offenses: (A) certain crimes "chargeable under State law and punishable by imprisonment for more than one year"; (B) any act which is "indictable" under any of a fairly long series of federal criminal statutes, including particularly Section 1341 (relating to mail fraud) and Section 1343 (relating to wire fraud); (C) any act "indictable" under Title 29, U.S. Code Section 186 (relating to crimes involving union activities); and (D) "any offense involving [bankruptcy] fraud . . ., fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States." [Emphasis added.]

"Pattern of racketeering activity," as defined in Section 1961(5), "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."

The provisions just quoted from Sections 1961, 1962, and 1964 represent the essence of the "black letter law" of civil RICO. The exertions of both counsel and the courts have now polished these provisions to a high gloss. And therein lies the problem which has produced this hearing.

By interpreting this statutory language to their clients' benefit, plaintiffs' counsel have succeeded generally in persuading the courts that two telephone calls or two letters may constitute wire fraud or mail fraud and, because the alleged fraud was accomplished twice, that the defendant had engaged in "a pattern of racketeering activity." Moreover, the allure of treble damages has led to the inclusion of a civil RICO count in complaints involving ordinary business disputes where by no stretch of the imagination could it be contended that the defendant was a part of "organized crime."

Sedima.--The U.S. Supreme Court's decision in the Sedima case/1 appears to have resolved any lingering doubts concerning the meaning and the reach of civil RICO. In reversing the Second Circuit Court of Appeals, the Supreme Court held that there is no requirement of a prior conviction as a condition precedent to the filing of a private civil RICO action. Nor, held the Court, is it required that the plaintiff establish "a racketeering injury." Rather:

> Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise./2

In the majority opinion, Justice White has passed the ball to Congress in these words:

> It is true that private civil actions under the statute are being brought almost solely against such defendants[/3] rather than against the archetypal, intimidating mobster. Yet this defect--if defect it is--is inherent in the statute as written, and its correction must lie with Congress./4 [Footnote omitted.]

In considering this present state of affairs, it may be instructive to read a word of prophecy in the legislative history of the Act. The House report contains the dissenting views of Congressmen Conyers, Mikva, and Ryan, who not only thought the whole bill "masqueraded under false pretenses," but regarded Title IX (RICO) as "particularly egregious." The House report goes on to say:

1/ Sedima, S.P.R.L., Petitioner v. Imrex Company, Inc., et al., 53 LW 5034, No. 84-648, July 1, 1985.

2/ Ibid., 53 LW 5039.

3/ "Such defendants" refers to a passage in the Second Circuit decision (741 F.2d 487) of which, Justice White said, "Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against respected and legitimate 'enterprises.'"

4/ Ibid.

> . . . section 1964(c) . . . provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the "indirect use" of such gains--a provision with tremendous outreach--litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish--destruction of the rival's business./1

Against this background a summary of the MAPI position and a fuller discussion of that position appear below.

Summary of MAPI Position

In brief, we recommend:

1. Subject to recommendations appearing below, criminal RICO and the government's rights under civil RICO should be preserved;
2. Repeal the private, treble damage remedy;
3. If it is decided to retain the private civil RICO remedy, it should be amended to conform to the central purpose of the Act; and
4. Whatever is done should be done promptly.

Subject to Recommendations Appearing Below, Criminal RICO and the Government's Rights Under Civil RICO Should Be Preserved

Let us make one thing clear at the outset. Although we are recommending drastic action with reference to private rights of action under civil RICO, we make only limited recommendations concerning the government's rights under criminal or civil RICO.

1/ Op. cit., U.S. Code Congressional and Administrative News, volume 2, p. 4083.

According to recent Justice Department testimony before a House subcommittee, "The results of the government's use of criminal RICO have been impressive."/1 The witness went on to speak of ". . . the need to preserve criminal RICO as the leading statutory weapon against all forms of organized criminal conduct." This is an encouraging report and one that is wholly consistent with the broad purpose of the original enactment. With prosecutions under criminal RICO provisions subject to the restraints of Justice Department guidelines, we believe this authority should be preserved.

As for civil RICO the Justice Department has apparently only recently sought to recover treble damages in a civil suit by filing suit as a "person" under Section 1964(c). Even though we favor repealing this authority for use by private citizens, individual or corporate, we have no objection to continuation of the government's power in this regard subject to those amendments recommended herein if Congress should choose not to repeal the private right of action.

Repeal the Private Civil RICO Remedy

In discussing amendatory options available to Congress, the Justice Department has said, "The major possibilities range from maintaining the status quo to abolishing the private right of action entirely."/2 We favor adoption of the latter possibility.

Civil RICO and congressional intent.--Judicial interpretation has sanctified a gross subversion of the original intent of this legislation. In dissenting to the Sedima decision, Justice Powell said:

> In both Turkette/3 and Russello,/4 we found that the "declared purpose" of Congress in enacting the RICO statute was "'to seek the eradication of organized crime in the United States'." . . . That organized crime was Congress' target is apparent from the Act's title, is made plain throughout the legislative history of the statute, see, e.g., S.Rep. No. 91-617, 91st Cong., 1st Sess., 76 (1969) (S.Rep.), and is acknowledged by all parties to these two cases./5

1/ Op. cit., Statement of Deputy Assistant Attorney General Keeney, p. 3.
2/ Ibid., p. 37.
3/ 452 U.S. 576 (1981).
4/ 104 S.Ct. 296 (1983).
5/ Op. cit., Sedima, 53 LW 5046.

As a matter of fact, the majority in the Sedima case has acknowledged as much in this statement: "We . . . recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."/1

The nature of this evolution is to be found in Justice Department statistics:

> Approximately 230 decisions in private RICO suits were found to have been reported [through 1984].
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> *　　*　　*
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> About two thirds of the reported private RICO suits have been predicated on mail fraud, wire fraud, or fraud in the sale of securities. Roughly seven percent appear to have been brought against organized crime figures or on the basis of violent or other non-fraudulent conduct common to organized crime (e.g., murder, arson, extortion, organized theft, public corruption, obstruction of justice, labor racketeering)./2 [Emphasis added.]

According to Justice White, writing for the majority in Sedima:

> RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. See generally Russello v. United States, 464 U.S. 16, ___ ___ (1983). While few of the legislative statements about novel remedies and attacking crime on all fronts . . . were made with direct reference to [Section] 1964(c), it is in this spirit that all of the Act's provisions should be read./3

"Private attorneys general."—Consistent with Justice White's admonition is the theory that "private attorneys general" created by Section 1964(c) will be a source of assistance to the overburdened Justice Department in its struggles with organized crime. This view is shared in the Justice Department's discussion of the pros and cons of civil RICO: "Defenders of private civil RICO suits begin by arguing that even small numbers of private actions are helpful in the fight against organized crime, and that the threat of such actions adds to the statute's overall deterrent effect."/4 However, according to Justice Department statistics, cited above, only about seven percent of private

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1/ Ibid., 53 LW 5039.

2/ Op. cit., Statement of Deputy Assistant Attorney General Keeney, p. 23.

3/ Op. cit., Sedima, 53 LW 5039.

4/ Op. cit., Statement of Deputy Assistant Attorney General Keeney, p. 29.

RICO suits filed by "private attorneys general" ". . . appear to have been brought against organized crime figures . . . ." From these figures, one can infer that these presumed defenders of the public weal have been primarily engaged in pursuit of treble damages and their clients' private interests.

Candidly, we think private treble damage suits have made, and are making, precious little contribution to the fight against organized crime. As noted above, such suits have increased drastically in recent years, and they are almost certain to increase now more rapidly, but their chief purpose will be the collection of treble damages and an attorney's fee.

We acknowledge that it can be argued, given the present state of the law, that counsel would be remiss in fulfilling his obligations to his client--that he would violate one of the canons of his profession--if he failed to avail himself of Section 1964(c).

The displacement of state and federal law.--We have no doubt that private civil RICO suits will increase materially in the near future, particularly because of the Sedima decision. The attractiveness of the treble damage remedy will tend to displace perfectly adequate remedies of longstanding in both state and federal law. In the case of state law, it strikes at our federal system which has always operated on the theory that, generally speaking, only those matters on which only the federal government can act should be confided to it. As for federal law, consider the testimony of Donald Egan, Esq., before this committee on September 24, 1985. Mr. Egan represented the defendant American National Bank & Trust Company in the Haroco/1 case and is widely experienced in civil RICO litigation: "Another consideration which must not be overlooked in deciding whether legislative reform is necessary is the total displacement of the law of private actions under the securities laws as it has evolved. Since recovery under the securities laws is limited to actual damages hardly a securities action is filed today which does not also include a RICO claim."/2

Delicious as it may appear to plaintiff's counsel, the treble damages provision is not the only tasty part of 1964(c). The Justice Department has this to say on that subject:

> Apart from the prospect it holds for treble damages and attorney's fees, the statute provides ready access to federal courts--with their liberal procedures governing such matters as service of process and discovery--to plaintiffs whose claims would otherwise not merit federal attention at all

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1/ 105 S.Ct. 3291 (1985).

2/ Testimony of Donald E. Egan, September 24, 1985, p. 8.

> or would be cognizable only upon compliance with strict standing or other procedural requirements./1

From this it will be seen that not only has Section 1964(c) with the treble damage provision attracted numerous suits normally triable in state courts--with far more in prospect after Sedima--but the shift is accentuated, and perhaps aggravated, by these procedural advantages.

Vilification and extortion.--To be charged in a publicly reported, private lawsuit with "racketeering activity" is to prejudice the outcome of the proceeding. This *in terrorem* impact is reflected in Justice Marshall's dissent in Sedima:

> . . . the defendant, facing a tremendous financial exposure in addition to the threat of being labelled a "racketeer," will have a strong interest in settling the dispute.
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> * * *
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> Many a prudent defendant facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat./2

Let us sum up the case against Section 1964(c):

1. It has resulted in a gross subversion of congressional intent.
2. It has "federalized" actions at law for which adequate civil redress is provided by state law and special federal statutes. And it has aggravated this development by the attractions of treble damages and liberalized federal procedures.
3. The assistance to law enforcement foreseen by creation of a role for "private attorneys general" is somewhere between slim and none and on balance does not justify the harm this provision has caused.
4. Many legitimate businesses have been publicly traduced as "racketeers." With the decision in Sedima, more will be.

1/ Op. cit., Statement of Deputy Assistant Attorney General Keeney, p. 21.

2/ Op. cit., Sedima, 53 LW 5041.

5. Repeal of the private right to sue for treble damages need not affect the right of the government to employ such a remedy. As for state authorities, there are now 23 "little RICOs" at the state level and more are being adopted.

In the light of these conclusions, we believe that Congress should repeal Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act.

Alternatively, Amend Civil RICO To Conform It to Original Congressional Intent

Although we would prefer repeal of Section 1964(c) with its private right to sue for treble damages, we recognize that Congress may prefer to attempt a solution by amendment of the Act. There are several possibilities of amendment which we believe should be considered. They are considered separately below.

Prior conviction requirement.--Congressman Boucher's bill, H.R. 2943 (cosponsored by Congressmen Fish, Gekas, and Hyde) would require proof of conviction of "racketeering activity or of a violation of Section 1962" as a condition precedent to initiating a civil RICO action. In addition, this measure would establish a statute of limitations of one year to run from ". . . the entry of the latest judgment of conviction against the defendant."

The prior conviction requirement has great merit in our opinion. It is simple to apply. It overcomes the problem of "private attorneys general" filing civil RICO suits without the constraints which apply to criminal actions in the form of restrictive Justice Department guidelines; under the Boucher bill, civil RICO suits would be automatically screened. It will be argued that adoption of the prior conviction requirement would lessen the enforcement value and the aid afforded Justice by the filing of civil RICO suits. On the basis of Justice Department statistics, heretofore cited in this statement, we think this would be a very limited sacrifice.

The prior conviction requirement is more nearly consistent with the original congressional intention than is the present situation. A prior conviction would provide relief to those injured by organized crime and whose injury is in no way redressed by indictment and conviction of the mobster. It is precisely this type of injury that RICO was adopted to fight. Finally, such a provision would eliminate the use of civil RICO against legitimate businesses in garden variety commercial disputes.

A variation on prior conviction.—If the Congress is unwilling to go all the way in requiring proof of a prior conviction in filing a private damage suit under RICO, it may wish to consider a variation of this approach.[1] Consideration should be given to dividing private damage suits under RICO into two classes with a prior conviction serving as the dividing line. Where there is a prior conviction, a suit for treble damages would be permitted. Where there is no prior conviction, a private suit would be limited to ordinary damages. Removing the lure of treble damages plus attorney's fees would substantially reduce the volume of private RICO litigation and especially of those cases which are manifestly frivolous.

Limit "predicate" crimes.--Justice White's majority opinion in Sedima contains a bit of dictum that serves as an appropriate introduction to this discussion: "The 'extraordinary' uses to which civil RICO have been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'patterns.'"[2] The present Section 1961 definition of "racketeering activity" is a principal source of all the vexatious civil RICO litigation and which was wholly unintended by Congress. We have examined Section 1961 at an early point in this statement, and we shall not repeat that review. Suffice it to say that, although the "laundry list" of predicate crimes is a long one, "About two thirds of the reported private RICO suits have been predicated on mail fraud, wire fraud, or fraud in the sale of securities," according to the Justice Department.[3]

The crimes of mail and wire frauds and fraud in the sale of securities are, of course, otherwise proscribed by an impressive array of federal and state law. Moreover, in the highly specialized field of federal securities law, the Justice Department and the federal judiciary have created an extensive, detailed, and sophisticated body of law over the past 50 years. With civil RICO, all of these proscriptions are tending to become "dead letters" and are likely to become more so following the Sedima decision.

In the light of all this, we recommend that those sections of Section 1961 dealing with mail and wire frauds and fraud in the sale of securities be stricken by appropriate amendment.

This amendatory surgery would at a single stroke dispose of about two-thirds of the problem. Moreover, it would conform to what we conceive to be a central principle which should guide legislative action in this area: No one should be entitled to treble damages who has not suffered substantial and repeated injury at the hands of organized crime. To be sure, neither RICO nor the Organized Crime Control Act of which it is a part defines "organized crime," but the dissenting members of the House, after noting in scornful terms the absence of a definition, said, "When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was." [Emphasis added.]/1 And "everybody" still knows what organized crime is.

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[1] The variant was originally suggested in the Report of the Ad Hoc Civil RICO Task Force of the American Bar Association Section of Corporation and Banking Law (p. 238).

[2] Op. cit., Sedima, 53 LW 5039.

[3] Op. cit., Statement of Deputy Assistant Attorney General Keeney, p. 23.

Redefine "pattern of racketeering activity."--At an early point in this statement, we called attention to definitional problems associated with the phrase, "pattern of racketeering activity." It was noted that it is by now accepted that the "pattern" requirement of the statute is satisfied by alleging fraud in the sending of two letters (mail fraud) or two telephone messages (wire fraud). What this has meant in most cases is that a single incident is the source of the two allegedly fraudulent acts which constitute the required "pattern" and with this legal fiction has come the resort to civil RICO in almost any sort of business dispute. To repeat ourselves, this is manifestly at odds with the alleged purpose of the legislation, but, inconsistent or not, it is now the law. What is to be done?

First of all, it may be useful once more to consult the Sedima decision. In footnote 14 (53 LW 5038), Justice White affirms what we have just said:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions of [Section] 1961 in that it states that a pattern "requires at least two acts of racketeering activity," [Section] 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does

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1/ Op. cit., U.S. Code Congressional and Administrative News, p. 4091.

> not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). * * * Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. [Section] 3575(e). This language may be useful in interpreting other sections of the Act. . . .

Justice White's footnote at least casts doubt upon the propriety of alleging fraud in two letters or two telephone calls--which may relate to the same transaction--as a basis for a treble damage suit under RICO. It also provides, we think, a framework of analysis for amendment.

If as Senator McClellan suggested, ". . . proof of two acts of racketeering activity, without more, does not establish a pattern . . .," what is necessary to establish that element of a civil RICO complaint? It seems to us that Congress should provide by amendment a new and higher standard of proof of the existence of a "pattern" and Senator McClellan's explanation provides a directional signpost. Senator Hatch's proposal, S. 1521, is a long step in the right direction. He would amend Section 1964(c) to provide that at least one act of racketeering activity--relied upon in establishing a "pattern"--shall be an act other than one indictable under federal criminal statutes dealing with mail and wire fraud or ". . . an offense involving fraud in the sale of securities." This would not reduce "the breadth of the predicate offenses" to which Justice White has called attention, but it would have the great virtue of ruling out reliance on two allegedly fraudulent incidents (mail or wire) relating to the same transaction.

We support Senator Hatch's proposal, although we suggest that either in amendatory language or in the Judiciary Committee's report it be made clear that, "The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes."/1

Repeal "liberal construction" proviso.--Section 904(a) of the Organized Crime Control Act says: "The provisions of this title shall be liberally construed to effectuate its remedial purposes."/2 This legislative injunction, which is not codified but appears in the Statutes at Large (84 Stat. 941, 947 (1970)), applies to both civil and criminal RICO.

1/ Op. cit., ABA Civil RICO Report, p. 72. Cited with approval in Justice Powell's Sedima dissent.

2/ Op. cit., U.S. Code Congressional and Administrative News, p. 1104.

The repeal of this provision's applicability to criminal RICO has been recommended by the ABA Criminal Justice Section report./1 Such a recommendation does not necessarily apply to civil RICO because the objection that the injunction to construe liberally contradicts the general rule of construing criminal statutes strictly does not apply to civil RICO. However, it is beyond peradventure that civil RICO has led to results that were not intended by its authors. We believe that the liberal interpretation proviso has made a not insignificant contribution to that result and we believe it should be repealed.

* * *

This concludes our statement on civil RICO. Again, we want to express our appreciation to the committee for this opportunity to present our views on a matter of very considerable interest to members of the Institute. If you should have any questions regarding our statement or if we can be of any assistance to the committee staff, do not hesitate to call upon us.

1/ A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation, American Bar Association Criminal Justice Section, Appendix A, p. 13.

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